Petition

81-656

No. .....

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CONSOLIDATED FOODS CORPORATION,

Petitioner,

v.

TRUDY UNGER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Seventh Circuit erred in refusing to accord any *res judicata* or collateral estoppel effect to the previous proceedings brought on plaintiff's claims under the Illinois Fair Employment Practices Act, Ill. Rev. Stat. Ch. 48, §§ 857 *et seq.*, where those proceedings included a full evidentiary hearing on the merits of Plaintiff's claims and the exhaustion by plaintiff of state administrative and judicial procedures.

Whether the Seventh Circuit erred in holding that the Respondent was entitled to attorney's fees for the state proceedings on her claim under the rule established in *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), where the Respondent did not prevail in those proceedings and where those proceedings were otherwise accorded no preclusive effect by the trial court or the Court of Appeals.

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IN THE

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OCTOBER TERM, 1981

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CONSOLIDATED FOODS CORPORATION,
Petitioner,

v.

TRUDY UNGER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Consolidated Foods Corporation,[1] prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on August 14, 1981.

[1] Pursuant to Rule 28.1 of the Rules of the Court, the following is a listing naming all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Petitioner Consolidated Foods Corporation: Douwe Egberts Superior Company.

Petitioner also would respectfully move this Court to consolidate the above-captioned action with that of *Kremer* v. *Chemical Construction Corporation,* No. 80-6045, in which a Writ of Certiorari to the Second Circuit was issued on June 22, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 26 Fair Employment Practice ("FEP") Cases 1025; and is reproduced herein as Appendix A. The judgment of the District Court is unreported and is reproduced herein as Appendix B.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on August 14, 1981 (Appendix A). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are Article IV, Section 1 of the United States Constitution, 28 U.S.C. § 1738, and relevant portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a), 2000e-5(b), and 2000e-5(k) (hereinafter referred to as "Title VII"), and are reproduced herein as Appendix C.

STATEMENT OF THE CASE

The instant case is an individual action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e

et seq. In it the Respondent herein, Trudy Unger (hereinafter "Unger" or "Respondent") claimed that she was unlawfully discharged because of her sex, and that she was unlawfully discharged a second time, after being rehired by Petitioner, in retaliation for filing a charge of sex discrimination with the Illinois Fair Employment Practices Commission ("FEPC").[2]

The Respondent was a sales representative[3] for Petitioner's Sirena Division, which was and is engaged in the manufacture and sale of women's swimwear and related accessories. In 1972, Sirena's substantial growth as a swimwear manufacturer, combined with a shift in primary retailing outlets from small specialty shops to large department stores, necessitated a large-scale reorganization of Sirena's sales territories and sales personnel. As part of this reorganization, Unger, along with five other male Sirena sales representatives, was terminated on the grounds that she had proven herself to be ineffective in selling to and dealing with department store customers.

Upon receiving notice of her termination, which was effective May 31, 1972, Unger telephoned Sirena's President, Arnold Seckler, expressing her distress at being terminated and indicating her desire to remain associated with Sirena. Thereafter, Seckler offered Unger the position of Sirena sales representative in a territory encompassing Missouri, Iowa, Nebraska, Kansas and that part

[2] The Illinois Fair Employment Practices Commission has since been renamed the Illinois Human Relations Commission; for the purpose of this petition its former designation will be used.

[3] Respondent's sales territory included the states of Michigan, Illinois, Indiana, Minnesota, Wisconsin, and, eventually, Ohio.

of Illinois outside Chicago. Unger accepted this position. Unger was the only one of the six terminated sales representatives to be offered another position with Sirena.

Respondent's second association with Sirena commenced August 1, 1972. However, after that date she visited sales customers in the Illinois portion of her territory only, making no effort to contact sales accounts in any of the other states she was charged with servicing. Despite numerous requests from her superiors to "get out on the road" and sell Sirena's swimwear line to customers, Unger made no attempt to contact any Company accounts outside of Illinois from September 1, 1972 to October 16, 1972, the date of her termination. As a result, Respondent completely missed all opportunities to solicit customer orders for the "cruise season," *i.e.*, the mid-winter vacation season. Cruise season sales constitute approximately 35% of Sirena's annual business volume, and are also an important early indicator of which swimwear styles will be popular throughout the rest of the year.

As Unger was apparently neglecting her sales responsibilities in her assigned territory, Sirena officials interviewed a possible replacement in mid-September. Shortly thereafter, Unger's superiors learned that Unger was representing a sweater manufacturer in a territory that encompassed Illinois, Wisconsin, Michigan, and portions of Indiana. At this time, the practice in the industry dictated that salespeople representing more than one product line had to represent those lines in the same geographical territory; otherwise, the salesperson's dual status logically served to dilute his or her sales efforts.[4] Two male sales representa-

[4] At trial, Sirena President Seckler used a stronger characterization to describe a saleperson's actions in selling non-competing product lines in adjacent territories: he referred to the practice as "stealing."

tives had previously been fired by Sirena for similar conduct.

Due both to her failure to service her entire Sirena sales territory and her conflicting territorial obligations with the sweater manufacturer, Unger was terminated by Sirena on October 16, 1972.

On October 2, 1972 Unger filed a charge with the Illinois Fair Employment Practices Commission ("FEPC"), alleging that her first termination from Sirena was discriminatory on the basis of sex. She subsequently filed a second charge with that agency which alleged that her October 16, 1972 termination was discriminatory on the basis of sex and was also in retaliation for Unger's filing of the first charge.

Unger's claims of discrimination received a full evidentiary hearing before the FEPC, which found in favor of Sirena on all claims.[5] That decision was appealed by Unger to the Circuit Court of Cook County, which reversed the decision of the Commission. Sirena thereafter appealed the Circuit Court's decision to the Illinois Appellate Court, which reversed the Circuit Court and reinstated the decision of the Commission. *See Unger* v. *Sirena, Division of Consolidated Foods Corporation*, 60 Ill. App. 3d 840, 377 N.E.2d 266 (1978) (reprinted herein as Appendix E). Unger's petition for leave to appeal to the Illinois Supreme Court was denied.

During the pendency of the state proceedings, Unger received a right-to-sue letter from the EEOC, and instituted a federal district court action on the same claims of discrimination previously litigated before the FEPC and

[5] The decision of the Commission is reprinted herein as Appendix D.

in the state courts. Sirena filed a motion for summary judgment in the federal action on the grounds that the doctrines of *res judicata* and collateral estoppel barred Unger from relitigating her claims in federal court. This motion was denied, and the case eventually tried before the Honorable Joseph Sam Perry, United States District Court judge. Judge Perry found for Unger on the issue of liability, awarding back pay in the amount of $141,190.82 and costs and attorney's fees for the federal court suit. However, Perry denied Unger's request for attorney's fees for the state proceedings.

Sirena appealed this judgment to the United States Court of Appeals for the Seventh Circuit, contending, *inter alia*, that the District Court had erred in refusing to accord any preclusive effect to the prior state proceedings on Unger's claims. Unger filed a cross-appeal on the back pay issue and on the trial court's refusal to award attorney's fees for the FEPC and state court litigation. On August 14, 1981, the Court of Appeals issued a decision affirming the trial court's denial of summary judgment to Sirena. The Court further held that Unger was entitled to attorney's fees for her unsuccessful state litigation.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The Instant Case Epitomizes The Factual Setting Mandating the Application of the Doctrine of Res Judicata in Title VII Actions

In *Kremer* v. *Chemical Construction Corp.*, No. 80-6045, this Court agreed to consider the question of the *res judicata* effect[6] to be afforded a state agency's administra-

[6] For the purposes of this petition the term *"res judicata"* shall be used to refer to the concepts of *res judicata* and collateral estoppel, as well as their modern equivalents, "claim preclusion" and "issue preclusion." *See* Restatement (Second) of Judgments at § 74 (Tent. Draft No. 3, 1976).

tive dismissal, without a hearing, of a charge of discrimination in a subsequent Title VII action based on the same claims.[7] In that case, the Court of Appeals for the Second Circuit, following its prior decisions in *Mitchell v. National Broadcasting Co.*,[8] and *Sinicropi* v. *Nassau County*,[9] held that the New York state agency's administrative dismissal of a *pro se* plaintiff's discrimination charge precluded a federal court action under the provisions of Title VII where the plaintiff exhausted all available state appeal procedures.

The instant case, while raising the same issue to be decided by this Court in *Kremer, i.e,* the applicability of preclusion doctrines to previous state administrative and judicial proceedings in a subsequent federal court action, presents a striking contrast to the facts in *Kremer*. This case involves the complete refusal of the federal district court and the Court of Appeals to accord *res judicata* effect —or, indeed, any effect at all—to the state FEPC proceedings on Unger's claims, even though those proceedings included a *full evidentiary hearing,* the issuance of a written

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[7] One of the reasons for the Supreme Court's acceptance of Kremer's petition for writ of *certiorari* was, presumably, the fact that the Second Circuit's holdings conflicted with those of other circuits deciding the preclusion issue. *See Cooper* v. *Philip Morris, Inc.* 464 F.2d 9 (6 Cir. 1972); *Smouse* v. *General Electric,* 626 F.2d 333 (3 Cir. 1980); *Garner* v. *Giarrusso,* 571 F.2d 1330 (5 Cir. 1978) *Gunther* v. *Iowa State Men's Reformatory,* 612 F.2d 1079 (8 Cir. 1980), *cert. denied,* 446 U.S. 966 (1980). The instant case is also obviously in conflict with the Second Circuit's decision, and the Petitioner herein advances that conflict within the circuits as an additional reason for the acceptance of its petition for writ of *certiorari.*

[8] 553 F.2d 265 (2 Cir. 1977).

[9] 601 F.2d 60 (2 Cir. 1979), *cert. denied,* 444 U.S. 983 (1979).

opinion by the full Commission, and Unger's full exhaustion of her appeal rights in the state courts.[10]

This court, in its issuance of a writ of *certiorari* in *Kremer*, has indicated its recognition of the need to decide this issue now; the Petitioner herein would respectfully submit that similar action on the instant petition would present the Court with the unique opportunity to determine the matter in its fullest context. *Res judicata* may or may not bar a Title VII action in a *Kremer* situation, where a *pro se* plaintiff's charge of discrimination was administratively dismissed by a state agency without a full evidentiary hearing. However, in the instant case, the preclusion of a full trial *de novo* in federal court could hardly be more appropriate or more in furtherance of the salutory objectives of common law preclusion rules and 28 U.S.C. § 1738. And, as the vast majority of states have authorities empowered to hear and determine employment discrimination claims,[11] clearly the issues presented by the instant petition will arise repeatedly in the future. Accordingly, a writ of *certiorari* should issue here to review the decision of the Seventh Circuit Court of Appeals.

Issuance of a writ in the instant case is dictated by the Seventh Circuit's complete and unjustifiable failure to ad-

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[10] In so doing, the Court of Appeals for the Seventh Circuit continued to follow its decision in *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975).

[11] Forty-one jurisdictions have both anti-discrimination statutes and enforcing agencies that are "deferral" agencies under Title VII; all provide for evidentiary hearings on discrimination claims found to be supported by reasonable cause, either before the enforcing agency (36 jurisdictions), or in the state courts (5 jurisdictions). In addition, 12 jurisdictions provide a claimant with an opportunity for a hearing on the state agency's dismissal of a charge of discrimination; in five of these states, such a hearing is mandatory. *See generally* 3 *Empl. Prac. Guide* (CCH).

here to the principles of *res judicata* most recently enunciated by this Court in *Allen* v. *McCurry*, U.S. , 101 S.Ct. 411 (1980).

In *Allen* v. *McCurry*, this Court reemphasized that "federal courts have traditionally adhered to the related doctrines of *res judicata* and collateral estoppel," noting that those doctrines "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Id.* at 415. The Court further stressed that the doctrine's application was limited only by the principle that the party against whom the prior decision is to be asserted must have had a "full and fair opportunity" to litigate the claim or issue in the earlier case. *Id.*

In the context of claims and issues decided by state courts, this Court noted that state court determinations had "consistently" been accorded preclusive effect in federal forums both pursuant to traditional preclusion rules and a specific Act of Congress. *Id.* at 415-16; 28 U.S.C. § 1738 (1976). Moreover, these doctrines were applied by the Court in federal civil rights actions following state court litigation despite "grave congressional concern that the state courts had been deficient in protecting federal rights." *Id.* at 417.

However, notwithstanding the well-settled nature of common law preclusion doctrines, the specific directive of 28 U.S.C. § 1738, and the clear language of this Court in *Allen* v. *McCurry*, the Seventh Circuit and numerous other courts of appeals have consistently refused to grant any preclusive effect whatsoever to state proceedings on employment discrimination claims. In so doing, these courts, unable to point to any provision of Title VII which either expressly or by implication prohibits application of common law preclusion principles or countermands the clear language of Section 1738, based their rulings on their per-

ception that "Congressional policy" dictated that Title VII plaintiffs in all circumstances be allowed to pursut their discrimination claims *de novo* in federal courts. *See e.g., Batiste* v. *Furnco Construction Corporation,* 503 F.2d 447, 450 (7th Cir. 1974).

The wrongheaded nature of this line of authority is revealed by perusal of the legislative history of the 1972 amendments to Title VII, upon which those circuits so heavily rely. That history clearly indicates a Congressional assumption that *res judicata* and collateral estoppel *would* apply to bar federal re-litigation of discrimination claims fully adjudicated on the state level.

Concerned with the burden placed on employers of defending the same claim in a variety of state and federal forums, and the adverse effect of such multiple litigation on all parties involved, Senator Hruska submitted an amendment to Title VII that would have vested jurisdiction of claims of employment discrimination solely in the EEOC and the federal courts. Senator Javits, a principal proponent of the 1972 revisions, opposed this amendment, arguing that it was unnecessary because relitigation of the same claim under Title VII would be barred by *res judicata:*

> Furthermore, there is the real capability in this situation of dealing with the question on the basis of res judicata. In other words, once there is a litigation—a litigation started by the Commission, a litigation started by the Attorney General, or a litigation started by the individual—the remedy has been chosen and can be followed through and no relitigation of the same issues in a different forum would be permitted. 18 Cong. Rec. 3370 (1972).

The Hruska amendment subsequently was narrowly defeated. *Id.* at 3372-73 (1972).

In *Allen* v. *McCurry,* Congressional concern over providing a federal remedy where states were "unwilling or un-

able to enforce federal rights"[12] was insufficient to insulate Section 1983 actions from general preclusion principles. What different result can be justified here, where the legislative history clearly indicates a Congressional intent that the principles of *res judicata* would apply fully to actions brought under Title VII?

Just as was found by this Court in Section 1983 actions, the arguments against the application of preclusion rules in Title VII suits have no foundation either in the language of Title VII, its legislative history, or its underlying purposes and policies. Thus, the only basis for allowing a plaintiff the right to litigate the same civil rights claims to decision first in state proceedings and then *de novo* in federal court is the general notion that a plaintiff must always be afforded the unfettered opportunity to pursue federal civil rights claims in a federal forum—a notion that was unequivocally rejected by this Court in *Allen* v. *McCurry:*

> The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. *But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee,* but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. *And no such authority is to be found in § 1983 itself.* For reasons already discussed at length, nothing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and

[12] *Allen* v. *McCurry,* 101 S.Ct. at 418, *citing Monroe* v. *Pape,* 365 U.S. 167, 176 (1961).

> fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. . . . *There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided simply because the issue arose in a state proceeding in which they would rather not have been engaged at all.* 101 S. Ct. at 419-20 (emphasis added; footnotes omitted).

The federal system's "final responsibility"[13] for the administration of the Title VII is neither abdicated nor undercut by the application of *res judicata*, as that doctrine is always limited by the proviso that the party against whom the prior decision is to be used must have had a "full and fair opportunity" to litigate his claims in the earlier proceeding. Where, as here, such an opportunity was available; where, as here, the state proceedings involved a full evidentiary hearing and post-trial review in the state courts, and where, as here, the state authorities were fully empowered to grant substantially all the relief available under Title VII,[14] the administration of Title VII would in no way be adversely affected by the application of *res judicata* to bar a second, complete trial on those claims in the federal courts. Accordingly, Petitioner respectfully urges that a writ of *certiorari* issue to review the decision of the Seventh Circuit Court of Appeals.

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[13] *Batiste* v. *Furnco Construction Corp.*, 503 F.2d at 450, *citing Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9, 12 (6th Cir. 1972).

[14] Of course, to the extent that Title VII provides rights or remedies unavailable under the relevant state law, application of preclusion principles would not bar proceedings in the federal courts. *See, e.g., New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980) (successful state litigant entitled to sue in federal court for award of attorney's fees under Title VII where that remedy is unavailable under state statute).

II. The Court of Appeals Clearly Erred in Awarding the Respondent Attorney's Fees for State Proceedings in Which She Indisputably Did Not Prevail and Which Were Otherwise Accorded No Weight Whatsoever by the Trial Court or the Court of Appeals

The Seventh Circuit Court of Appeals, after holding that the state proceedings on Unger's claims were entitled to no preclusive effect whatsoever, then addressed Unger's cross-appeal on the issue of attorney's fees. The court held that Unger was entitled to fees for her unsuccessful state litigation under the rationale set forth by this Court in *New York Gaslight Club, Inc.* v. *Carey*,[15] and further stated that "[t]o hold otherwise would discourage resolution of discrimination claims in state proceedings." 26 FEP cases at 1033-34.

Apparently, the Court of Appeals is of the view that a plaintiff who indisputably loses an action on the state level is entitled to attorney's fees for those efforts, even though she clearly was not a "prevailing party" in those proceedings, even though those proceedings otherwise have no legal significance whatsoever in the view of the Court of Appeals, and even though the correct application of the applicable law would have either barred the federal proceeding entirely or resulted in a judgment for Sirena in that forum as well. Unfortunately, try as it might, the Petitioner can find no support for this result in *New York Gaslight Club*, in which the plaintiff clearly prevailed throughout the state proceedings, and in which those proceedings constituted the sole dispositive determination of the plaintiff's claims. Similarly, while the Court of Appeals professes concern with fostering state resolution of discrimination claims, this concern was glaringly absent when

[15] 447 U.S. 54 (1980).

that court rejected the opportunity to give the decision of the state tribunals the full faith and credit to which they were entitled under the Constitution, traditional preclusion rules, and 28 U.S.C. § 1738.

In any event, the allowance of fees to the Respondent for proceedings in which she indisputably did not prevail is in no way authorized by either Section 706(k) of Title VII or the reasoning of *New York Gaslight Club,* and cannot be justified on any public policy grounds. Accordingly, Petitioner would respectfully urge that a writ of *certiorari* issue to review this aspect of the Court of Appeals decision as well.

CONCLUSION

On the basis of the foregoing facts, arguments and authorities, Petitioner respectfully requests that writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Seventh Circuit. Petitioner also respectfully moves this Court to consolidate the instant case with *Kremer* v. *Chemical Construction Corp.*, No. 80-6045, and to consider the issues presented in these cases as a whole.

Respectfully submitted,

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Appendix

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Nos. 80-2792 and 80-2844

TRUDY UNGER,

Plaintiff-Appellee, Counter-Appellant,

v.

CONSOLIDATED FOODS CORPORATION,

Defendant-Appellant, Counter-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 77 C 364 —**J. Sam Perry**, *Judge.*

ARGUED MAY 28, 1981—DECIDED AUGUST 14, 1981

Before SPRECHER, *Circuit Judge,* and MARKEY, *Chief Judge,** and CUDAHY, *Circuit Judge.*

SPRECHER, *Circuit Judge.* This is an appeal and cross-appeal from the district court's judgment that, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., plaintiff was wrongfully terminated from employment because of her sex and in retaliation for filing a complaint with the Illinois Fair Employment Practices

* Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, is sitting by designation.

Commission ("FEPC") alleging sex discrimination. These appeals present questions as to: 1) the collateral estoppel effect in Title VII actions of prior state proceedings; 2) the sufficiency of the evidence regarding the findings of sex discrimination and retaliatory firing; 3) the proper measure of damages; and 4) the propriety of the district court's judgment denying plaintiff attorneys' fees for her unsuccessful efforts in the state proceedings.

I

Plaintiff, Trudy Unger, was employed from 1962 to October 16, 1972, as a sales representative by Sirena, Inc. ("Sirena") and subsequently, by Consolidated Foods Corporation.[1] Sirena manufactures and distributes women's swimwear. Until her first termination, effective July 31, 1972, plaintiff was the exclusive Sirena sales representative for Illinois, Indiana, Minnesota, Michigan, Wisconsin, and Ohio ("Midwest territory"). As such, she was entitled to commissions on all sales of Sirena swimwear to customers in the Midwest territory. In a letter of May 31, 1972, from Sirena, plaintiff was terminated as sales representative in the Midwest territory effective July 31, 1972. Prior to her termination, plaintiff was the only female sales representative in Sirena's ten year history. She was replaced by John A. (Tony) Herrmann, Jr.; no women were interviewed for her position. On June 30, 1972, plaintiff was rehired by Sirena and was appointed sales representative for Iowa, Nebraska, Kansas, Missouri, and Illinois (excluding Chicago) ("Prairie territory") beginning August 1, 1972.

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[1] Sirena, Inc. was acquired by Consolidated Foods Corporation in 1971 and thereafter was operated as a division of Consolidated Foods Corporation. References to Sirena are intended to apply to Sirena Inc. and to the Sirena Division of Consolidated Foods Corporation.

On October 2, 1972, plaintiff filed a charge of sex discrimination, pursuant to the Illinois Fair Employment Practices Act, Ill.Rev.Stat., ch. 48, § 851 et seq., with the FEPC based on her discharge from the Midwest territory. On October 13, 1972, Sirena received notice of the FEPC complaint. On October 13 and October 16, plaintiff received telephone calls from Maurice Newman, Vice President and National Sales Manager of Sirena, and Arnold Seckler, President of Sirena, urging plaintiff to either drop her suit or resign and telling plaintiff the suit would cost her a lot of money and just make the lawyers rich. Plaintiff refused to drop her complaint or resign. On October 16, 1972, Seckler sent plaintiff a letter terminating her employment. On October 27, 1972, plaintiff filed a second claim with the Illinois FEPC asserting that the second termination was in retaliation for filing her first charge.[2]

Plaintiff's state charges were heard before a Hearing Examiner appointed by the FEPC. He recommended to the FEPC a finding in favor of Sirena on the charge of sex discrimination and against Sirena on the charge of retaliatory discharge. The FEPC reviewed the record, reversed the finding of retaliatory discharge, and affirmed the finding of no sex discrimination.

Plaintiff sought review of the FEPC's adverse decision in the Circuit Court of Cook County pursuant to the Illinois Administrative Review Act, Ill.Rev.Stat. ch. 110, § 274 et seq. The Circuit Court concluded that the FEPC's action was contrary to the manifest weight of the evidence, re-

[2] Plaintiff also filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging sex discrimination and retaliatory firing. In light of the state proceedings, the EEOC deferred action on the federal charges pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c).

versed the FEPC's judgment, and found that Sirena' first discharge was discriminatory and the second retaliatory.

Sirena appealed to the Illinois Appellate Court, which reversed the Circuit Court and reinstated the FEPC's findings that the discharges were non-discriminatory and non-retaliatory. *Unger* v. *Sirena Div. of Consol. Foods Corp.*, 60 Ill.App.3d 840, 377 N.E.2d 266 (1978). Plaintiff's Petition for Leave to Appeal to the Illinois Supreme Court was denied.

During the pendency of the Illinois proceedings, plaintiff received a right-to-sue letter from the EEOC and, on February 2, 1977, filed the instant action in the United States District Court for the Northern District of Illinois. Plaintiff alleged discriminatory discharge on the basis of sex in violation of Title VII, 42 U.S.C. § 2000e-2(a)[3] and retaliatory discharge in violation of Title VII, 42 U.S.C. § 2000e-3.[4] A trial de novo was held before Judge Perry, sitting without a jury. At the conclusion of the trial, Judge Perry entered his findings of fact and conclusions of law finding for plaintiff on the issues of sex discrimination and retali-

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[3] 42 U.S.C. § 2000e-2(a) provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin;

[4] 42 U.S.C. § 2000e-3 provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

atory discharge. The court awarded plaintiff $141,190.82 as back pay and ordered Sirena to pay plaintiff for her costs and attorneys' fees incurred in prosecuting the federal suit.

Sirena appeals from the district court's conclusion that Sirena violated Title VII in discharging plaintiff from either the Midwest or Prairie territories. Plaintiff cross-appeals from the court's judgment limiting back pay to $141,190.82 and barring plaintiff's recovery of costs and attorneys' fees incurred in the state proceedings.

II

Sirena argues that the district court erred in denying its motion for summary judgment. Sirena argues that plaintiff is precluded, under the principles of either collateral estoppel or election of remedies, from relitigating the issue of plaintiff's discharge that was decided adversely to her by the FEPC and the Illinois Appellate Court. We reject Sirena's attempt to undermine the effectiveness and independence of de novo federal judicial review of Title VII claims.

In *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447, 450 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975), this Circuit "rejected the application of the doctrines of election of remedies and res judicata to Title VII actions where plaintiffs had litigated their charges to final adjudication in state proceedings. There is a strong Congressional policy that plaintiffs not be deprived of their right to resort to the federal courts for adjudication of their federal claims under Title VII." The court reasoned further that "if federal actions are barred by the application of election of remedies and res judicata, then the statutory scheme of deferral to state proceedings will be frustrated by requiring that the plaintiff, who desired to bring an action in federal court,

first commence state proceedings but abandon them quickly before an adjudication is made." *Id.*

Our reasoning in *Batiste* is reinforced by the Supreme Court's analysis in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). There, the Supreme Court held that the submission of an employee's complaint of racial discrimination to final arbitration pursuant to the non-discrimination clause of a collective-bargaining agreement did not preclude the employee from seeking a trial de novo in federal district court under Title VII. The Court stressed that "federal courts have been assigned plenary powers to secure compliance with Title VII." 415 U.S. at 45. Analyzing Title VII's relationship to other remedies against discrimination, the Court stated that:

> Title VII provides for consideration of employment-discrimination claims in several forums . . . . And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.

415 U.S. at 47-48 (footnotes and citations omitted).

With the exception of the Second Circuit's brief per curiam opinion in *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2nd Cir.), *cert. denied*, 444 U.S. 983 (1979),[5] every court to

[5] Sirena's reliance on *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2nd Cir.), *cert. denied*, 444 U.S. 983 (1979), is misplaced. In *Sinicropi*, the Second Circuit held in a brief per curiam opinion that a Title VII plaintiff, who previously had submitted her claim of sex discrimination to the New York State Division of Human Rights and had thereafter appealed the agency's adverse decision through the New York courts, was precluded by the principles of res judicata from relitigating in federal court her claim of sex dis-

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address the question of the relationship between federal judicial proceedings under Title VII and related state proceedings concerning employment discrimination has used reasoning consistent with our *Batiste* analysis and has refused to give preclusive effect to the state proceedings. *See*

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[5] *continued*

crimination. The court relied solely upon its holding in *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265 (2nd Cir. 1977), that the principles of res judicata apply to actions under 42 U.S.C. § 1981. In *Sinicropi*, the court, without analysis, concluded that the reasoning for applying res judicata in § 1981 actions was equally applicable to suits under Title VII.

Sinicropi has been vigorously attacked and soundly rejected by other courts. *Smouse* v. *General Electric Co.*, 626 F.2d 333, 336 (3rd Cir. 1980); *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1083-84 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); *Kralowec* v. *Prince George's County*, 503 F.Supp. 985, 991-92 (D.Md. 1980). As these decisions clearly demonstrate, *Sinicropi* ignores the fundamental differences between actions under 42 U.S.C. § 1981 and those under the unique statutory structure of Title VII. We join these courts in rejecting *Sinicropi's* attempt to interfere with Title VII's statutory scheme by applying principles of res judicata to prevent plaintiffs from securing a trial de novo in federal court.

Similarly, defendant's reliance on the Supreme Court's recent pronouncement in *Allen* v. *McCurry*, U.S. , 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), regarding the application of res judicata and collateral estoppel to cases under 42 U.S.C. § 1983 is misplaced. In concluding that res judicata and collateral estoppel could bar a plaintiff's federal suit under 42 U.S.C. § 1983 on the basis of prior state proceedings, the Court stressed that the statutory and congressional history of § 1983 does not evidence any intent to deny binding effect to valid state proceedings. 101 S.Ct. at 416-17. That history, however, is in direct contrast to the abundant statutory and legislative evidence that Title VII envisions a dual federal and state enforcement scheme culminating in an independent right to a trial de novo in federal court. *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-47 (1974).

Smouse v. *General Electric Co.*, 626 F.2d 333, 336 (3rd Cir. 1980) (per curiam); *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1084-85 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9, 11-12 (6th Cir. 1972); *Kralowec* v. *Prince George's County*, 503 F.Supp. 985, 990-93 (D.Md. 1980).

Sirena attempts to distinguish *Batiste* and the other cited decisions on the ground that, in those cases, it was not the plaintiff-complainant who had sought state judicial review of the state administrative proceedings. In the present case, however, plaintiff elected to seek state judicial review of the FEPC's decision rather than to immediately pursue her right to seek a trial de novo in federal court pursuant to Title VII. Sirena reasons that plaintiff's decision to pursue state judicial review constitutes an election of remedies and precludes relitigation of the issues involved in the state proceedings.

We find Sirena's distinction to be without significance. Regardless of which party seeks state judicial review of administrative proceedings, foreclosure of Title VII's federal judicial remedy would serve to discourage plaintiffs from fully pursuing state proceedings and would conflict with Title VII's statutory scheme, which encourages resolution of discrimination claims by state authorities while reserving the right to proceed in federal court. Our analysis is consistent with the Supreme Court's in *Gardner-Denver*, 415 U.S. at 49 n.10, that "[t]he policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel."

Sirena argues, alternatively, that if the state proceedings are not given preclusive effect, the district court erred, nevertheless, by failing to give any weight to the findings of the Illinois Appellate Court without articulating any

reasons for rejecting the state proceedings. Sirena argues that *Gardner-Denver,* 415 U.S. at 60 n.21, required the district court to accord very substantial weight to the state court's findings.

Sirena misconstrues the import of the Court's comment in *Gardner-Denver.* The Court clearly recognized Title VII's requirement of a trial de novo on plaintiff's claims of employment discrimination. Although the Court suggested that the trial court could receive the record of state proceedings as evidence to be accorded such weight as the court deems appropriate, the Court also stressed that "courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum." 415 U.S. at 60 n.21.

In the present litigation, the factual background of the case is largely undisputed. The significant question in this case, and in the numerous, conflicting state proceedings, is the inference of discriminatory intent to be drawn from those facts. This question was specifically a matter for the district court to consider in its trial de novo. The trial court's ultimate legal conclusion that Sirena did discriminate against plaintiff is exactly the type of independent legal analysis contemplated by Title VII. *See Stewart* v. *General Motors Corp.,* 542 F.2d 445, 449 (7th Cir. 1976), *cert. denied,* 433 U.S. 919 (1977). Consequently, the trial court committed no reversible error in its refusal to accord greater weight to the contrary legal conclusions of the state proceedings.[6]

[6] In light of our conclusion that plaintiff's suit is not barred by the prior state proceedings and that the trial court did not err in refusing to accord greater weight to the state proceedings, Sirena's "Renewed Motion to Supplement Record," which was taken with the case at oral argument, is denied.

III

Sirena challenges the sufficiency of the evidence to support the district court's findings of fact and conclusions of law that Sirena violated Title VII. "In reviewing the district court's decision, we are bound under Fed.R.Civ.P. 52(a) to accept findings of fact unless they are clearly erroneous." *Stewart* v. *General Motors Corp.*, 542 F.2d at 449, *citing Prince* v. *Packer Mfg. Co.*, 419 F.2d 34, 36 (7th Cir. 1969).[7] However, "[a] distinction must be drawn between subsidiary facts to which the 'clearly erroneous' standard applies, and the ultimate fact of discrimination within the meaning of Title VII . . . ." *Id.* The latter requires "an independent examination of whether defendant's conduct constitutes a violation of Title VII." *Id.*

A

Sirena challenges the district court's conclusion that Sirena discriminated on the basis of sex in discharging plaintiff as sales representative for the Midwest territory.[8] Sirena does not challenge the trial court's conclusion that plaintiff established a prima facie case of sex discrimination by introducing evidence that plaintiff, the only female sales representative for the Midwest territory and, with

[7] Sirena argues that since the district court adopted plaintiff's proposed findings of fact almost verbatim, except with respect to the measure of damages, we should scrutinize those findings more closely than usual. As stated on numerous other occasions, "[w]e agree that we must review the record carefully in such cases, but emphasize that the 'clearly erroneous' standard still applies." *Canfield* v. *Rapp & Son, Inc.*, No. 80-2836, slip op. at 13 n.8 (7th Cir. July 6, 1981), and cases cited therein.

[8] Sirena first raises a jurisdictional question. It challenges the court's conclusion that plaintiff was an "employee" within the meaning of Title VII rather than an independent contractor not

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[8] *continued*

within the scope of Title VII's coverage. Title VII defines "employee" very broadly to mean "an individual employed by an employer . . . ." 42 U.S.C. § 2000e(f). In determining whether a business relationship is one of employee-employer, courts look to the "economic realities" of the relationship and the degree of control the employer exercises over the alleged employee. *See Spirides* v. *Reinhardt*, 613 F.2d 826, 831-32 (D.C. Cir. 1979). In deciding whether an individual is an employee and, thus, within the scope of Title VII's protections, courts should keep in mind the remedial nature of Title VII and construe it liberally so as to further the goals and purposes of eliminating discrimination in employment. *See Spirides*, 613 F.2d at 831; *Quijano* v. *University Federal Credit Union*, 617 F.2d 129, 131 (5th Cir. 1980).

Sirena does not argue that the district court applied an incorrect standard or that the court's detailed findings outlining the scope and nature of the employment relationship are incorrect. Rather, Sirena argues that the district court's conclusion based on these facts is incorrect and that the court should have given greater significance to plaintiff's contract with Sirena, which referred to her as an "independent contractor."

Sirena's argument reduces itself to a mere disagreement with the court's assessment and balancing of the numerous factors in the employment context. As such, we find it unpersuasive. First, "[c]onsideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative." *Spirides*, 613 F.2d at 831 (footnote omitted). Consequently, "although contract language may be indicative to some degree of the intention of the parties, it is not necessarily controlling." *Spirides*, 613 F.2d at 832 (footnote omitted). Thus, although plaintiff's contract was in evidence, its language does not control plaintiff's status under Title VII. Second, the district court, in Finding # 11, listed eleven examples of the ways in which Sirena exercised economic and managerial control over plaintiff, including regular sales reports, payment of some business expenses, regular draws against commissions, plaintiff's exclusive and lengthy representation of Sirena, Sirena's withholding of taxes beginning in 1972, and Sirena's treatment of plaintiff's successor. The district court did not abuse its discretion by weighing these factors and concluding that plaintiff was an "employee" within the meaning of Title VII.

no women being interviewed for her position, was replaced by a man. In addition, plaintiff introduced abundant evidence to show that she had been performing her job for almost a decade without receiving any oral or written criticisms of her job performance and that, in fact, plaintiff's sales record for the Midwest territory far outstripped the rate of growth for Sirena's nationwide sales. Consequently, it is clear that plaintiff carried her burden of establishing a prima facie case of sex discrimination. *See Texas Dept. of Community Affairs* v. *Burdine*, U.S. , 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).

Sirena's contention is that the court erroneously concluded that Sirena failed to articulate legitimate, nondiscriminatory reasons for plaintiff's discharge and also erroneously concluded that plaintiff proved that Sirena's proffered reasons are pretextual. Sirena offered evidence that plaintiff's discharge was a part of a company-wide sales force reorganization in which five other salespersons, all male, also were terminated. Sirena also offered testimony that plaintiff was being replaced in part because of her inability to adequately service large department store accounts. We need not decide whether, in fact, the court erroneously concluded that Sirena's reasons were inadequate to rebut plaintiff's prima facie case of sex discrimination,[9] for we are convinced that the court found, and

[9] There is some confusion between the district court's conclusion that Sirena failed to articulate any legitimate, nondiscriminatory reasons for plaintiff's discharge and its conclusion that the reasons articulated by Sirena are a mere pretext for a discriminatory discharge on the basis of sex. There has been nearly continuous confusion in the lower courts regarding the proper semantics to employ in describing the respective burdens of proof and production of evidence in Title VII employment discrimination cases. *Compare*

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the evidence supports the finding, that Sirena's reasons are pretextual. *See Sherkow* v. *Wisconsin, Dept. of Public Instruction*, 630 F.2d 498, 503 (7th Cir. 1980).

First, the district court found that plaintiff's termination was unrelated to any alleged sales reorganization. The court's finding that four of the terminated sales representatives were dismissed for evident incompetency or old age was amply demonstrated by sales figures and company documents. The fifth representative, was, like plaintiff, a very successful salesperson whose territory was reorganized. But, unlike plaintiff, he was offered the bulk of his former territory and a protective agreement to maintain his earnings. No such offer was extended to plaintiff. On the basis of these findings, the district court concluded that the sales reorganization was pretextual with respect to plaintiff. We have reviewed the record and do not find the court's analysis to be clearly erroneous.

Second, the court found that plaintiff had never received any oral or written criticisms of her sales performance. Unlike the situation with respect to the other terminated sales representatives, Sirena had no documents critical of plaintiff's sales performance. Indeed, Sirena's records reveal that plaintiff's sales had increased from $20,620 in 1962 to $572,016 for 1972 (2,674%), while Sirena's overall sales

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[9] *continued*

Texas Dept. of Community Affairs v. *Burdine*, U.S. , 101 S.Ct. 1089 (1981), with *Bd. of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978), and *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567 (1978). We are convinced that, in light of the trial court's extensive findings of fact discussing the pretextual nature of defendant's proffered reasons, the court properly considered the evidence and did not impermissibly shift the burden of proof to Sirena. *See Burdine*, 101 S.Ct. at 1093 ("ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff").

during that period had only increased from $383,241 to $3,578,826 (833%). Plaintiff had successfully introduced Sirena's swimwear line into almost every major deparement store in the Midwest territory. Two purchasers for major department stores testified that plaintiff was very competent in servicing their needs. In light of this and other evidence, the court concluded that, once again, Sirena's proffered explanation was pretextual. The court's findings are not clearly erroneous.

Plaintiff met and carried her burden of establishing a prima facie case of sex discrimination and of proving that Sirena's proffered reasons were pretextual. The district court properly concluded that Sirena had violated 42 U.S.C. § 2000e-2(a) by discharging plaintiff from the Midwest territory on the basis of her sex.

B

Sirena also challenges the district court's conclusion that, in terminating plaintiff from the Prairie territory, Sirena had retaliated against plaintiff for filing a charge of sex discrimination with the FEPC and, thus, had violated 42 U.S.C. § 2000e-3(a). Sirena does not argue that plaintiff failed to show a prima facie case of retaliation. Rather, Sirena again argues that the court erroneously dismissed its proffered reasons for plaintiff's second termination as pretextual.

Sirena offered two basic reasons justifying its discharge of plaintiff from the Prairie territory. First, Sirena contended that plaintiff's failure to travel outside of Illinois between August 1, 1972 and October 16, 1972, the date of her termination, demonstrated her lack of success and effort on behalf of Sirena. Second, Sirena contended that plaintiff's dismissal was justified because plaintiff and con-

tracted to represent a noncompetitive knit sweater line of Beldoch-Popper in a different territory.

The district court carefully considered Sirena's proffered reasons for plaintiff's dismissal and concluded that they were pretextual. We conclude that the court's findings are not clearly erroneous. There is abundant, and nearly overwhelming, evidence that plaintiff's termination from the Prairie territory was motivated directly and primarily by a desire to retaliate against plaintiff for filing the first charge of sex discrimination with the FEPC. The evidence casts grave doubt upon the validity of Sirena's alleged reasons for dismissal.

First, plaintiff did not receive her show samples from Sirena until September 9, 1972, thus precluding earlier travels. Second, plaintiff had attended Sirena's August sales meeting in Califonria and had made arrangements to show the Sirena line at major buyers' conventions in St. Louis and Chicago in October and November. Third, plaintiff had begun to make sales contracts in the area surrounding Chicago and intended to work outwards through the entire territory after the St. Louis convention. Plaintiff had discussed her travel strategy with officers of Sirena, and they had not objected. Indeed, at the time of her termination, plaintiff's sales in the Prairie territory exceeded the sales for the comparable period of the prior year. Fourth, there is evidence that Sirena knew plaintiff required a second, noncompetitive line in order to survive in the Prairie territory, that Sirena consented to her carrying a second line, that Sirena had been informed by plaintiff of her intention of carrying the Beldoch-Popper line in an adjacent territory, and that Sirena had not objected.[10]

[10] Sirena asserts that the district court erred in denying its request to subpoena and depose the national sales manager of Beldoch-

Finally, in addition to the evidence which casts grave doubt upon the legitimacy of Sirena's reasons, there is overwhelming evidence of a discriminatory motive. Upon first learning of plaintiff's FEPC complaint, Sirena Officials called and harassed plaintiff, urging her to either drop her suit or resign. When plaintiff refused to do either, Sirena immediately terminated her for the alleged insufficiencies in her work. We simply cannot ignore the timing of Sirena's actions or the very transparent reasons given for the termination. Consequently, the district court properly concluded that Sirena had violated 42 U.S.C. § 2000e-3(a).

IV

The first issue on plaintiff's cross-appeal concerns the propriety of the district court's calculation of back pay. The district court, acknowledging its inability to calculate back pay with absolute precision, awarded damages for 1973 through 1980 based on the difference between plaintiff's actual earnings during those years ($44,309.18) and the amount she would have earned absent Sirena's wrongful discrimination, estimated by the court to be $25,000 per year for a total of $200,000. The latter figure was based on plaintiff's estimated average earnings from Sirena for the eight year period 1973-1980, considering plaintiff's sales record, her subsequent sales efforts, and her

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Popper in hopes of impeaching plaintiff's testimony regarding the industry practice of sales representatives carrying noncompetitive lines in adjacent territories. Defendant's request came at the close of evidence of an already protracted trial. The trial court has broad discretion to control the course of litigation and will be reversed only upon a clear showing of abuse of discretion and of prejudice to the right of the moving party. We find neither an abuse of discretion in the denial of defendant's untimely motion, nor, in light of the overwhelming evidence of Sirena's retaliatory motive, any significant prejudice to Sirena.

intervening physical disabilitities. In addition to reducing the $200,000 figure by plaintiff's actual earnings during this period, the court also reduced the award by $14,500 for special expenses plaintiff would have incurred to maintain sales because of intervening physical incapacities of plaintiff. The court also refused to award prejudgment interest or "front pay." Thus, the district court awarded plaintiff $141,190.82 as back pay.

Plaintiff, however, argues that the district court should have calculated the back pay award not on a speculative estimate of plaintiff's earnings, but on the actual earnings of plaintiff's successor in the Midwest territory, Tony Herrmann. Plaintiff introduced evidence that Herrmann's actual earnings after expenses from 1973 through 1980 totalled $387,831.10. If this figure were reduced by plaintiff's actual earnings during 1972-1980 and her special expenses, plaintiff would receive $329,021.92 as back pay. Alternatively, plaintiff argues that a flat $25,000 per year rate fails to take into account plaintiff's regular and consistent increase in earnings over the prior years. Plaintiff not only points to her past sales record and earnings increases, but also relies on Herrmann's actual sales earnings increases as evidence that her income also would have risen during these years. Consequently, plaintiff argues that the court erred in its calculation of back pay.

It is well established that the trial court has broad discretion in awarding back pay and that its method of assessing the amount of back pay will be set aside only for an abuse of discretion. *Skerkow* v. *Wisconsin Dept. of Public Instruction,* 630 F.2d 498, 504 (7th Cir. 1980); *Comacho* v. *Colorado Electronic Technical College, Inc.,* 590 F.2d 887, 888 (10th Cir. 1979); *Waters* v. *Wisconsin Steel Works of Internat'l Harvester Co.,* 502 F.2d 1309, 1321 (7th Cir. 1974), *cert. denied,* 425 U.S. 997 (1976);

Thornton v. *East Texas Motor Freight*, 497 F.2d 416, 421 (6th Cir. 1974).

The district court's findings discuss at length the court's method and reasons for the award of back pay. The court stressed, among other things, tthe highly speculative and personal nature of sales, plaintiff's intervening physical infirmities, and plaintiff's actual sales performance. Although different considerations may be appropriate and within a court's discretion, *see Kamberos* v. *GTE Automatic Electric, Inc.*, 603 F.2d 598, 603 n.6 (7th Cir. 1979); *EEOC* v. *Kallir, Philips, Ross, Inc.*, 420 F.Supp. 919, 923 (S.D.N.Y. 1976), *aff'd*, 599 F.2d 1203 (2nd Cir.), *cert. denied*, 434 U.S. 920 (1977), we find no abuse of discretion in the district court's use of an estimate of plaintiff's sales earnings as opposed to use of her successor's sales record.

Plaintiff also argues that an award of prejudgment interest to compensate for the eight years between her discharge and the district court's judgment was appropriate. "While we would agree that interest on wages due an owing is an available remedy to a plaintiff in a Title VII action, . . . the decision whether or not to award such interest is within the discretion of the trial court." *Taylor* v. *Philips Indus., Inc.*, 593 F.2d 783, 787 (7th Cir. 1979) (citations omitted). We find no abuse of discretion in the district court's denial of prejudgment interest in this case.

V

Plaintiff's second argument on the cross-appeal challenges the district court's denial of attorneys' fees for work done in connection with the state proceedings. Plaintiff argues that in light of *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980), she is entitled under 42 U.S.C.

§ 2000e-5(k),[11] as the "prevailing party" to recovery of her attorneys' fees, absent special circumstances, *see Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978), for all work done in connection with prosecuting this Title VII claim. We agree.

In *New York Gaslight Club*, the Supreme Court held that Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), authorized "a federal-court action to recover an award of attorney's fees for work done by the prevailing complainant in state proceedings to which the complainant was referred pursuant to the provisions of Title VII." 447 U.S. at 71. Plaintiff prevailed throughout the state administrative and judicial proceedings on her allegation of race discrimination, which had been referred to the state agency pursuant to 42 U.S.C. § 2000e-5(c). During the pendency of the state judicial appeals, plaintiff filed a federal court action under Title VII. When the state proceedings became final, plaintiff moved in federal court for an award of attorneys' fees for work done in the state and federal proceedings. The district court denied recovery of fees for the state proceedings, and the Second Circuit reversed. The Supreme Court affirmed, in an opinion clearly applicable to the case at bar.

First, the Court determined that Congress intended Section 706(k) to authorize fee awards for work done in administrative as well as judicial proceedings. 447 U.S. at 61. The Court then concluded that the statute did not distinguish between state proceedings and federal proceedings. 447 U.S. at 61-63. The Court then analyzed the purpose

[11] Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k) states:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

behind § 706(k) in conjunction with the joint state and federal enforcement scheme envisioned by Title VII. The Court noted that:

> Permitting an attorney's fee award to one in respondent's situation furthers this goal [of facilitating the bringing of discrimination complaints], while a contrary rule would force the complainant to bear the costs of mandatory state and local proceedings and thereby would inhibit the enforcement of a meritorious discrimination claim.

447 U.S. at 63. The Court reasoned further that a denial of attorneys' fees for work done in state proceedings would also undermine Title VII's goal of encouraging the resolution of discrimination claims in state proceedings. 447 U.S. at 65. Consequently, the Court held that the plaintiff there was entitled to attorneys' fees for work done in state proceedings.

Sirena attempts to distinguish *New York Gaslight Club* by stressing that here, plaintiff was not a "prevailing party" in the state administrative or judicial proceedings. Sirena's logic is not compelling. First, we agree with the District Court for the District of Columbia that:

> In Title VII litigation "prevailing party" refers to the party who has successfully maintained a claim and does not depend upon the degrees of success at any particular stage of its prosecution.

Marshall v. *Communications Workers of America*, 21 EPD (CCH) ¶ 30,318 at 12,723 (D.D.C. 1979).

Second, we believe the Supreme Court implicitly rejected Sirena's reasoning in *New York Gaslight Club*. In concluding that a Title VII complainant could bring a civil suit in federal court solely to recover attorneys' fees for work in state proceedings wherein complainant had prevailed on the merits, the Court stated:

> It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level.

447 U.S. at 66. We believe the Court meant that plaintiffs who ultimately prevail in federal court are entitled to recover attorneys' fees for work in state proceedings which Title VII required and encouraged them to pursue, without respect to the success or failure on the merits of the state proceedings. To hold otherwise would discourage resolution of discrimination claims in state proceedings, would be inconsistent with Title VII's scheme of coordinated state and federal enforcement, and would contradict the clear meaning of § 706(k). Consequently, the district court's judgment denying attorneys' fees for work done in state administrative and judicial proceedings is reversed and remanded for a determination of an appropriate award.[12]

VI

For the foregoing reasons, the judgment of the district court finding Sirena liable for violations of Title VII, 42 U.S.C. §§ 2000e-2(a) and 3(a), and awarding plaintiff back pay is affirmed, and the court's ruling denying attorneys' fees for work done in the state proceedings is reversed and remanded. The judgment is

AFFIRMED IN PART
REVERSED AND REMANDED IN PART

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[12] We have reviewed the record and conclude that no "special circumstances" exist that would justify denial of attorneys' fees in this case.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TRUDY UNGER,
Plaintiff,
vs.
CONSOLIDATED FOODS CORPORATION,
Defendant.
No. 77 C 364

JUDGMENT ORDER

This action came on for trial before the court, and the issues having been duly tried, and the court having this day entered simultaneously herewith its Findings of Fact and Conclusions of Law, in accordance therewith

It is ORDERED and ADJUDGED that plaintiff, Trudy Unger, have and recover from defendant, Consolidated Foods Corporation, the sum of $141,190.82 representing damages occasioned to the plaintiff.

It is FURTHER ORDERED that plaintiff, Trudy Unger, have and recover from defendant, Consolidated Foods Corporation, her costs and attorney's fees in this Federal court suit. The court retains jurisdiction of this cause to allow costs and to determine the amount of plaintiff's reasonable attorney's fees and a hearing thereon will be set by the court immediately after the judgment herein becomes final.

ENTER:

J. S. PERRY
Judge

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TRUDY UNGER,

Plaintiff,

vs.

CONSOLIDTED FOODS CORPORATION,

Defendant.

No. 77 C 364

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on for trial before the court, sitting without a jury, and the court, having heard the testimony of the witnesses, weighed its credibility, considered the exhibits, and all the evidence in the case, and now being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff, Trudy Unger ("plaintiff" or "Unger"), is a woman who was employed by Sirena, Inc. ("Sirena") and, subsequently, by Consolidated Foods Corporation, as a sales representative for the sale of women's swimsuits from August 13, 1962 through October 16, 1972.

2. Defendant, Consolidated Foods Corporation, was organized under the laws of the State of Maryland and does business in Illinois and other states and has more than 15 employees.

3. Consolidated Foods Corporation ("Consolidated") acquired Sirena, Inc., a manufacturer of women's swimsuits

in 1971 when it became a division of Consolidated Foods Corporation. The reference to "Sirena" covers both the period when Sirena was a separate corporation as well as the activities of Consolidated Foods Corporation through its Sirena division after the acquisition.

4. Arnold Seckler was the principal owner of Sirena at the time of its acquisition, had formed the Sirena corporation, and remained its President both before and after its acquisition.

5. At all pertinent times, Maurice B. Newman, also known as Corky Newman, served as Vice President and National Sales Manager of Sirena.

6. The Equal Employment Opportunity Commission, which had deferred its charge, Charge No. TCH 3-1736, to the Illinois Fair Employment Practices Commission pending hearings therein, issued its right-to-sue letter on November 3, 1976.

7. Unger worked for Sirena from August 13, 1963 through May 31, 1972 as sales representative for the sale of women's swimsuits. She was exclusive representative in the territory comprising Illinois, Indiana, Minnesota, Michigan, and Wisconsin. Later in 1966, Ohio was added to her territory. This territory is hereinafter referred to as the "Midwest" territory.

8. In a letter of May 31, 1972 from Arnold Seckler, Unger was terminated from the Midwest territory effective July 31, 1972.

9. Unger was replaced by a man, John A. Herrmann, Jr., also known as Tony Herrmann. No woman was interviewed.

10. After conversations with Arnold Seckler, Unger was rehired and reappointed to a territory comprising Iowa,

Nebraska, Kansas, Missouri, and Illinois (outside of Chicago), by a letter of appointment dated June 30, 1972. This territory will hereinafter be referred to as the "Prairie" territory.

11. Throughout Unger's employment, Sirena exercised economic and managerial control over her job, as evidenced by the following.

A. Sirena restricted Unger's work to a geographical territory.

B. Sirena required Unger to attend sales meetings and follow sales bulletins.

C. Sirena required Unger to report to the company about sales progress on a weekly basis.

D. During her period of employment, Unger reported regularly and directly to Arnold Seckler, President, or, beginning in 1971, directly to Corky Newman, Vice President and National Sales Manager.

E. Sirena paid part of Unger's expenses for the showroom.

F. Sirena paid Unger's costs of attending sales meetings.

G. Unger received draws against her commission from the company rising to $2250.00 per month in the sales year ending June 30, 1972.

H. Beginning in 1970, Unger dropped all other lines and became exclusive representative for Sirena.

I. Beginning in June 1972 Sirena took deductions for withholding for Federal Income Tax and Social Security.

J. In June 1972 Unger was also promised insurance and profit sharing benefits.

K. Tony Herrmann, who replaced Unger in the Midwest territory, performed the same duties as Unger and was placed on regular payroll status with $400

per week salary, subject to withholding and social security deductions, $400 draw against commissions, and with the title of Vice President.

12. Unger's employment record and the record of Sirena shows that when Unger began work with Sirena, it was a very small company. From the comparative standpoint:

A. From 1965 through 1972 Unger's sales, according to company records, increased from $20,620.00 per year to $572,016.00 per year.

B. During the same period, 1965 through 1972, the sales of Sirena increased from $383,241.00 to $4,578,826.00.

C. In the same period of time, Unger increased the sales in her territory to 27 times while the company increased its total sales by only 10 times.

D. Unger's share of the total business of the company during the same period increased from 3.6% to 8.36%.

13. The only standard for performance given by Sirena to Unger was in 1966 when Seckler projected that the business in the Midwest territory would rise to "$250,000.00 in a few years." In that year, the Unger sales were $37,275.00 in her territory. In the third sales year thereafter (1969) she had increased the sales to $339,498.00, exceeding the company's standard by $89,000.00. Two years later, in 1971, Unger had doubled the $250,000.00 standard reaching sales of $514,900.00.

14. During all of the years of Unger's employment, defendant employed 26 different sales representatives but Unger was the only woman sales representative of Sirena. No women were interviewed either when she was replaced in the Midwest territory or in the Prairie territory.

15. Unger, the only woman territorial representative, was originally employed in 1963 by Seckler. This does not

indicate any lack of discrimination inasmuch as, at that time, the company had difficulty attracting qualified representatives.

16. Unger introduced the Sirena line to the Midwest and developed the territory for Sirena.

A. Unger opened substantially all major department store accounts in the Midwest except Strouss Hirschberg. However, she booked orders for that company in 1972.

B. The correspondence between Arnold Seckler and Trudy Unger and the company records trace the development of the large department store sales in the Midwest territory.

17. Despite the constant flow of communication between Unger, Seckler and Newman, Unger never received any oral or written criticism of her sales ability during the nine years she worked the Midwest territory for Sirena.

A. In his testimony, Seckler admitted that he had never given any oral or written criticism to Unger.

B. The letters from Arnold Seckler to Trudy Unger record only compliments as to her sales ability.

C. Although the minutes of Sirena's Executive Committee meetings specifically record the sales inadequacies of Burgy, Gorrel, and Gorel, they are silent about Unger.

D. The only evidence of prior criticism of Unger's work comes from Corky Newman's deposition.

E. Newman's testimony lacks credibility.

(1) Newman's testimony is biased and inconsistent with documentary evidence and testimony.

(2) Despite his words, in March, 1972 Newman entrusted Unger with a sales seminar he was obliged to conduct at the major department store, J. L. Hudson, in Detroit, Michigan.

F. John Dodge of Carson, Pirie, Scott & Company and Dorothy Green of Chas. A. Stevens presented the only independent testimony on sales ability which was free from interest or bias. According to these witnesses who were familiar with the work of both Unger and Herrmann, Unger very competently managed large department store accounts.

18. The New York showroom existed to service the buyers of large department stores who went to New York for a central buying location and Unger properly used the New York showroom.

19. In the termination letter of May 31, 1972, Seckler stated the reason for the termination of Unger as a corporate reorganization.

20. In the conversations that followed that termination between Seckler and Unger, Seckler specifically said sales had nothing to do with the termination.

21. Seckler now asserts that Unger was also terminated for inability to sell large department stores. The evidence does not support that assertion.

22. Unger's termination did not stem from a corporate reorganization. Defendant claims that the discharge of five sales representatives, all of whom are men, is evidence of a corporate reorganization and lack of discrimination in the Unger discharge. The defendant failed to show any relationship between the discharge of the five representatives and the claim of corporate reorganization. The five male representatives discharged were Harry Copeland, Cy Martin, Robert Burgy, Earl Gorel, and Howard Gorrel. There was no relationship between these discharges and the claim of reorganization or the Unger discharge for the following reasons:

A. According to the testimony of defendant's witnesses as well as the sales figures and notations in

the Executive Minutes, the sales representatives Burgy, Earl Gorel, and Howard Gorrel were admittedly incompetent and discharged for incompetency. There was no evidence of Unger's incompetency.

B. The testimony discloses that Copeland was in his mid-70's and many years beyond retirement and had told the company that he wanted to retire both for age and for physical impairment. Unger was 52 years of age and had not indicated any desire to retire.

C. Cy Martin, the representative in California, carried other lines and, in 1971, his territory was reorganized with certain of his accounts assigned to Weinstock, who had joined the company as Vice President. Martin was given the opportunity to work with Weinstock and did for that sales year. Martin finally decided that he did not want to work under those conditions and left the company. Unger was given no consideration in retaining her territory under any changed conditions.

D. Other than the testimony of Newman and Seckler, no background was supplied as to the termination of the five representatives and no documentation was introduced by the defendant pertaining thereto. The Court finds it difficult to believe that there was no documentary evidence pertaining to five terminations.

23. After Unger's original discharge from the Midwest territory and her rehiring to the Prairie territory, a letter confirming that fact was sent to her by Seckler. Dolores Tessendorf, a member of the Executive Committee of Sirena, was employed at the home office and also served as secretary to Seckler. After typing the original termination letter for Seckler, Dolores Tessendorf typed the rehiring letter for Seckler. She also sent her own note with the rehiring letter stating: Maybe it's not *JUST* a man's world after *all.*" In addition, Arnold Seckler made a statement in the presence of the manager of his shipping department in discussing Unger's performance that "Maybe a man would do a better job in that territory." These statements

reflect the attitudes of Sirena toward the continued employment of a woman as sales representative.

24. On October 2, 1972, Unger filed a charge of sex discrimination with the Illinois Fair Employment Practices Commission. This charge related to her discharge from the Midwest territory by defendant.

25. On Friday, October 13, 1972, Sirena received notice of the charge of discrimination.

26. On the same day that the notice was received, Corky Newman called Unger to discuss the charge. He wanted to know how she could be suing the company and still work for it. He also told her to return her samples contrary to the provisions of her contract as representative for the Prairie territory.

27. On Monday, October 16, 1972, Unger spoke with Seckler over the telephone. Seckler told her she was making a mistake by filing the charge of discrimination and asked her to drop the charge. He also insisted that it would "cost her a lot of money" and the "only ones who would get rich were the lawyers." He advised her that Consolidated Foods had "a lot of lawyers sitting around doing nothing." That same day, Seckler sent Unger a letter of termination.

28. Unger was replaced in the Prairie territory by a man, Earl Baird. No woman was interviewed.

29. On October 27, 1972 Unger filed a second claim with the Illinois Employment Practices Commission asserting that the second termination was a retaliation for her first charge.

30. On November 3, 1976 while the state proceedings were pending on review, the Equal Employment Opportunity Commission issued its right to sue letter to Unger and this action was filed on February 2, 1977.

31. The reasons given by Sirena for the discharge of October 16, 1972 are without basis, inconsistent, and contradictory.

32. In the termination letter of October 16, 1972, Seckler stated the reason for the termination as: "You have not made a single trip to Kansas, Nebraska, Iowa or Missouri with our 1973 line." Prior to that date, in September, Unger had fully disclosed to Newman her plans for handling the Prairie territory in the following manner:

A. Appropriate efforts to add a second line as required by the substantially reduced compensation in the second territory. Seckler admitted that a second line was necessary to support the sales representative.

B. Arrangements to take space at the St. Louis apparel show in October 1972 with opportunity to make direct contact with buyers from all parts of the Prairie territory who would be expected to attend that show.

C. Following the St. Louis apparel show, she would proceed out into the various states of the territory from St. Louis.

D. Arrangements to take space at the apparel show market at McCormick Place in November 1972 with the opportunity to make direct contact with buyers at the show.

E. Travel throughout the state of Illinois which held a substantial part of the business in the new territory.

No objection was made by Newman to those plans and no termination letter resulted therefrom. It was only after news of the filing of the original complaint for discrimination that action was taken. The Court concludes that the facts do not support that the assertion that the termination was because Unger had not made a trip to Kansas, Nebraska, Iowa or Missouri prior to October 16, 1972.

33. Although it was never stated in the letter, Seckler in his testimony said that the primary reason for the termination was Unger's carrying of a knitwear line in an adjacent territory. Seckler referred to the fact that Unger had made arrangements to take on a non-competitive sweater line with Beldoch-Popper. The territory included Illinois, Wisconsin, Michigan, and the part of Indiana between Indianapolis and South Bend. Thus, the territory overlapped the Sirena territory in Illinois and was adjacent territory in the other areas. The evidence does not support the conclusion that the carrying of the Beldoch-Popper line in overlapping territory was a violation of Unger's contract for the following reasons:

A. Unger's letter contract for the Prairie territory, drafted by Sirena, and dated June 30, 1972 prohibited Unger only from carrying a competitive line. It was silent on the question of any conflict in territories. A sweater line is not competitive and is sold at a different season. The only language on the contract on the subject was: "We understand that you are carrying non-competitive lines at the present time and we acknowledge the same; however, if you take on a competitive line, we will consider this a breach of the agreement."

B. During the period of her work for Sirena according to a letter from Seckler and the testimony, Unger had carried knitwear lines which were non-competitive in adjacent territories without objection from Sirena.

C. By mid-September, Newman had been informed that Unger had taken the Beldoch-Popper line in the over-lapping territory. He made no written or oral objection thereto and it was only after the filing of the FEPC complaint that Unger was terminated.

D. No reference was made in the termination letter to any complaint about taking on the Beldoch-Popper line in an over-lapping territory.

34. Unger properly conducted her work in the Prairie territory.

A. In August 1972, Unger attended the sale meeting in California.

B. In August and September she contracted for space in McCormick Place for the Chicago market and for space for the St. Louis market, making the necessary cash deposits.

C. During those months, she spent time making arrangements to find and contract to carry a second non-competitive line to supplement her substantially lower income in the Prairie territory.

D. A sales representative cannot sell until he or she receives samples. Unger did not receive her samples until September 9, 1972.

E. After receiving her samples and observing the Jewish holiday of Yom Kippur, Unger started her swing through Illinois.

F. Newman had been informed of Unger's travel plans and made no objection.

G. By October 13, 1972, Unger's sales exceeded the sales of Earl Gorrel in the Prairie territory for the preceeding year.

35. Due to the terminations of May 31, 1972 and October 16, 1972 Unger lost earnings from the Midwest territory and the Prairie territory between 1972 and 1980.

36. Although Unger was unable to carry sample cases for six weeks in 1974, 26 weeks in 1975, and 26 weeks in 1976, the evidence shows that it would cost $250.00 per week to hire someone to carry the bags for her based upon her earlier experience at Sirena.

37. Unger's disability was a partial, not a total, disability.

38. It also appears from the evidence that plaintiff suffered a fractured ankle in January, 1977, had it surgically corrected in February, 1978, and had physical therapy until November, 1978.

39. After her termination from Sirena, Unger held other jobs from 1973 through 1980, including: New Issues, Marbella; Can't Miss, Added Dimensions; National Jewish Hospital; and American Invsco.

40. Plaintiff was a victim of discrimination and she is entitled to a back pay award to compensate her for her economic loss. The court has to make a conscientious effort to calculate a reasonable and equitable award to make plaintiff whole under conditions which do not allow for absolute precision and it must attempt to make a reasonable award based on available data. Her back pay should be governed by equitable considerations and limited to her actual damages.

Plaintiff has urged the court to calculate back pay based first upon the amount plaintiff calculates was earned by plaintiff's replacement, John A. Herrman, Jr., for the period 1973-1980 in the amount of $387,831.10, and then to deduct therefrom plaintiff's actual earnings during the eight-year period in the amount of $44,309.18, and the expenses plaintiff figures would have been required for additional help during the 58-week period between 1974 and 1976 when Unger was unable to carry sample cases due to a parital back disability in the amount of $14,500.00, for a total back pay award of $329,021.92.

The court finds that an appropriate formula for determining plaintiff's back pay entitlement is the difference between her actual earnings for the period 1973-1980, or eight years, and those she would have earned absent the discrimination. However, the court cannot, as plaintiff urges, equate her potential earnings in the 1973-1980 period

with the commissions earned by John Herrmann, her replacement, based on total sales reported by the company for the years 1973-1980, minus Herrmann's costs and expenses as calculated by plaintiff. The evidence shows that Herrmann had, in the company's opinion, a "remarkable" sales record, especially with large store accounts. The court cannot speculate that plaintiff would have developed sales to the extent that Herrman did, although in the years 1965-1972, Unger's sales for Sirena had steadily increased; and if she had not been discharged, she would have had the opportunity to demonstrate her sales ability. However, to use Herrmann's earnings as a basis would call for an assumption that plaintiff would have had the same amount of commissions and that she would have had the same amount of costs and expenses; and, further, such a calculation would not take into account those periods when plaintiff would have been handicapped in her travelling and selling efforts by physical disabilities. The court instead finds it would be more equitable to look to the evidence of her earnings before the loss of her initial territory and to consider her potential earnings under her circumstances had she continued in her initial territory.

Absolute precision in ascertaining plaintiff's loss under the circumstances cannot be expected and the court can only arrive at a reasonable award based on available data. In evidence are the income tax returns of plaintiff for several years. She reported the following net profit from her work as a sales representative for wholesale ladies apparel (including Sirena and other apparel lines) on Schedule C of her United States Income Tax returns as $7,022.70 in 1968; $15,360.00 in 1969, $14,564.00 in 1970. It appears from her 1971 return that in that year she was a sales representative for Sirena only and was not representing other lines. In 1971, plaintiff reported gross income from Sirena, Inc. of $34,921.00; rent reimbursement from Sirena

of $1,200.00, and sublease of a portion of offices, for a total of $37,021.00, from which she deducted business expenses in the sum of $14,493.00, leaving a net profit of $22,528 from her work as a sales representative. Her 1972 return shows she had a 1099 statement from Sierna for $24,392.00; a 1099 statement from Belloch-Popper, Inc. for $1,379.00; and other items of business income to bring her total business income to $27,371.00, from which she deducted $15,563.00 for business expenses, leaving net profit from her work as a sales representative for wholesale ladies apparel at $11,808. On her 1973 return, Trudy Unger showed her business income as $4,003.00 with deductions of $15,113.00, for a loss of income of $11,110. To her return was also attached a W-2 form from New Issues apparel for $15,709.00. In 1974, she reported commissions of $338.00 from Added Dimensions and $335.00 in commissions for Marbella Knits, for a total of $673.00 in commissions from which she deducted $2,649.00 in expenses, leaving a $1,976.00, and also attached was a W-2 statement showing $1,178.00 from New Issues apparel for $1,178.00. On the 1974 return she also noted: "My previous business offices were at 318 W. Adams which was [sic] totally destroyed by explosion August 1973. Since that time I was out of business but attempted to engage in activies sales apparel with no success. However, back injury also curtailed activities." Plaintiff's 1975 return shows receipts of Trudy Unger Assoc. as $1,374.00 from which she deducted $908.00 in deductions, leaving her a $466 net on Schedule C. By July 1976, plaintiff was working as a fund raiser for the National Jewish Hospital and she later became a real estate sales representative on commission. Plaintiff did make reasonable efforts to find replacement lines of apparel after her discharge and there was not a failure on her part to mitigate damages.

In attempting to ascertain the amount of commissions plaintiff could have earned from Sirena, the court has considered her sales record with Sirena prior to her discharge, her income as a sales representative for others in subsequent years, and those periods in which she might have earned commissions from Sirena had she attempted to obtain "additional services" which she claims would have enabled her to continue travelling and selling during periods of disability. Based on all the evidence in this case, the court finds that if her potential earnings from Sirena in the eight years were averaged out, Trudy Unger could have reasonably earned $25,000.00 a year as a sales representative for the Sirena Division of Consolidated Foods Corporation, or a total of $200,000.00 in the eight-year period. The court finds this amount to be fair, reasonable and equitable. In mitigation of damages, plaintiff's earnings from other employment during the eight years should be deducted. The court finds these earnings to be $13,285.53 in 1973; $1,127.19 in 1974; zero in 1975; $4,154.11 in 1976; $902.15 in 1977; $520.00 in 1978; $6,677.00 in 1979; and $17,643.50 in 1980, for a total of $44,309.18 in earnings from other employment during the years in question. Although plaintiff did not make an attempt to obtain "additional services" during the period of her back disability, the court accepts plaintiff's argument that she could have done so had she continued as a sales representative for Sirena, and, further, finds that plaintiff's estimate of the costs of these services at $14,500.00 is reasonable. The $44,309.18 in earnings plus the $14,500.00 in special expenses total $58,809.18, and this last figure deducted from $200,000.00 leaves Unger's loss at $141,190.82 as a result of Sirena's discriminatory discharge, exclusive of any interest and attorney's fees.

41. Plaintiff also urges the court to retain jurisdiction of this case for the purpose of making a yearly front pay

award calculated by plaintiff from 1981 through the year 1993 as $1,369,083.73 and she also seeks prejudment interest and attorney's fees and costs. The court finds plaintiff's request for a front pay award is inappropriate. Front pay is employed to prevent a recalcitrant defendant from delaying the remedial process and is used to compensate a plaintiff until he or she is given a chance to fill a future vacancy. In this case plaintiff has not requested reinstatement and the evidence indicates plaintiff has decided to discontinue selling wearing apparel. The court cannot accept under the circumstances the assumption that she would have continued selling Sirena swimwear from 1981 until 1993 at the age of 70. Such a front pay award would be highly speculative and unwarranted. Further plaintiff chose to relitigate her claims in the Federal court after losing in the Illinois Appellate Court under Illinois law. The defendant has litigated the matter in this court in good faith. Under the circumstances, plaintiff is entitled to an equitable award for past economic injury to the date of this judgment and not to a front pay award.

42. While the award of prejudment interest is an available remedy to a plaintiff in a Title VII action, the decision whether or not to award it is within the discretion of the trial court; and under the circumstances of this case, the court does not find prejudment interest warranted and that to assess prejudment interest against defendant would be inequitable. The court finds the defendant has not been recalcitrant and has relitigated the case in this court in good faith.

43. The court finds plaintiff is entitled to her costs of action and to reasonable attorney's fees in this Federal court suit. The court retains jurisdiction to determine the amount of attorney's and to allow costs and a hearing thereon will be set by the court immediately after the judgment herein becomes final.

44. Inasmuch as plaintiff has been awarded damages for the initial discharge, there is no reason to calculate damages on the retaliatory discharge other than costs or attorney's fees pertaining thereto. Such costs and attorney's fees pertaining to the retaliatory discharge will be included in the allowance of attorney's fees and costs herein.

Conclusions of Law

1. Plaintiff, Trudy Unger, is an employee within the meaning of Title VII of the Civil Rights Act of 1964.

2. Defendant, Consolidated Foods Corporation, is an employer within the terms of Title VII of the Civil Rights Act of 1964.

3. The court has jurisdiction over this action.

4. Sirena's discharge of Unger from the Midwest territory by letter of May 31, 1972 was a discriminatory discharge on the basis of sex in violation of Title VII, 42 USCA § 2000e-2(a), in that:

A. Plaintiff made a *prima facie* case of sex discrimination by showing, to a preponderance of the evidence:

(1) A discriminatory motive on the part of defendant in discharging plaintiff.

(2) That defendant treated plaintiff less favorably because of her sex.

B. Defendant failed to articulate legitimate nondiscriminatory reasons for that termination.

C. The reasons articulated by the defendant are mere pretext for a discriminatory discharge on the basis of sex.

5. Sirena's discharge of Unger from the Prairie territory by the letter of October 16, 1972 was a retaliatory

discharge in violation of Title VII, 42 USCA § 2000e-3, in that:

A. Plaintiff made a *prima facie* case of retaliation by showing, to a preponderance of the evidence:

(1) defendant's action in challenging plaintiff's rights to make the initial claim of discrimination on the day that defendant learned of the filing of the claim;

(2) defendant's further assertion seeking to persuade plaintiff to withdraw the claim on the following business day;

(3) plaintiff's refusal to back down; and

(4) defendant's summary discharge of plaintiff on the same day, October 16, 1972.

B. Defendant failed to articulate any legitimate, non-discriminatory reasons for the discharge of October 16, 1972.

C. The reasons articulated by the defendant are mere pretext for such discharge.

6. The defendant, having terminated the employment of plaintiff without cause on the initial discharge, and on the basis of sex discrimination, should compensate the plaintiff Unger for the loss of that job by an award of back pay, attorney's fees and costs.

7. The calculation of damages based on the initial discharge is as follows:

A. The back pay award due plaintiff is calculated on the basis of Unger's loss of earnings from Sirena based on the loss of her initial territory for the period 1973 through 1980, less actual earnings by Unger during this period, less the expenses of additional help during the 58-week period between 1974 and 1976 when Unger was unable to carry sample cases due to a partial back disability, calculated as follows:

Court's Finding of Loss of Earnings	$200,000.00
Less: Total Actual Earnings by Unger (1973-1980)	—44,309.18
Less: Total Expense for Additional Help (1974-1976)	—14,500.00
Total Damages	$141,190.82

B. Plaintiff is entitled to her costs of action and to reasonable attorney's fees in this Federal court suit. The court retains jurisdiction to determine the amount of attorney's fees and to allow costs and a hearing thereon will be set by the court immediately after the judgment herein becomes final.

8. Inasmuch as plaintiff has been awarded damages for the initial discharge, the court concludes there is no reason to calculate damages on the retaliatory discharge other than costs or attorney's fees pertaining thereto and such costs and attorney's fees will be included in the allowance of plaintiff's attorney's fees and costs herein.

As separate Judgment Order is being entered herein in accordance with these Findings of Fact and Concluions of Law of the court and simultaneously herewith.

ENTER:

J. S. Perry
Judge

Dated: Dec. 2, 1980

APPENDIX C

U.S. Const. art. IV, § 1:

Full Faith and Credit shall be given in each State to public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. § 1738:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 2000e-2(a)(1):

It shall be an unlawful employment practice for an employer—

> . . . to fail or refuse to hire or to discourage any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

42 U.S.C. § 2000e-3(a):

It shall be unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. § 2000e-5(b):

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In deter-

mining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

42 U.S.C. § 2000e-5(k):

In any action or proceeding under this title the court may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

APPENDIX D

STATE OF ILLINOIS

FAIR EMPLOYMENT PRACTICES COMMISSION

IN THE MATTER OF TRUDY UNGER *Complainant,* AND SIRENA DIVISION OF CONSOLIDATED FOODS CORPORATION *Respondent.*	CHARGE NOS. 72 C—1136 72 C—1197

FINAL ORDER AND DECISION OF THE COMMISSION

In October, 1972, Complainant TRUDY UNGER filed two charges of unfair employment practices with the Commission against Respondent SIRENA DIVISION OF CONSOLIDATED FOODS CORPORATION. In Charge No. 72C-1136 Complainant, who was employed by Respondent as a sales representative alleged that she had been discriminated against because of her sex. She stated that Respondent had terminated her employment, replaced her with a man, then rehired her, but assigned her to a less desirable territory. Complainant also charged, No. 72C-1197, that she had been retaliated against in that subsequent to her charge of sex discrimination, she was threatened with a lawsuit and finally discharged by Respondent.

Subsequent investigation by the Commission disclosed substantial evidence to support these charges, whereupon

conciliation efforts were undertaken unsuccessfully, and a complaint was issued by the Commission on April 27, 1973. A public hearing was held before Daniel Shulman, Hearing Examiner, who made findings of fact and recommended that Complainant's charge of sex discrimination, No. 72C-1136, be dismissed, but that the charge of retaliation, No. 72C-1197, be sustained. The Recommended Order and Decision is now before us for review pursuant to Article VII, sec. 7.1 of the Rules and Regulations of Procedure under the Fair Employment Practices Act.

I. PROCEDURAL AND JURISDICTIONAL ISSUES

Prior to filing its answer Respondent moved to dismiss the complaint on the following grounds: (1) that Respondent does not employ twenty-five or more employees within the State of Illinois and therefore is not an employer as defined in Section 2(d) of the Fair Employment Practices Act, Ill. Rev. Stat., n. 48, sec. 852 (1971); that Complainant was not an employee as defined in Section 2(b) of the Act, but an independent contractor; (3) that Charge No. 72C-1136 was not timely filed, the discriminatory act having occurred more than 120 days prior to the filing of the charge; (4) that the Commission failed to serve notice of Charge No. 72C-1136 within ten days after the charge was filed, in contravention of section 8 of the Act; (5) that the complaint in Charge No. 72C-1197 was not timely issued and served, the complaint having been issued more than 180 days after the charge was filed, in violation of Section 8.01(a) of the Act; and (6) that, similarly, the complaint in No. 72C-1136 was not timely issued and served.

The motion was argued at pre-hearing conference before the Hearing Examiner, who denied Respondent's motion *in toto*. The Examiner ruled that the issues of whether Respondent employes more than twenty-five employees and whether Complainant was an "employee" as defined in the

Act were evidentiary in nature and should be the subject of evidence at the hearing.

With respect to Respondent's contention that Charge No. 72C-1136 was filed more than 120 days after the alleged discriminatory act, the Examiner ruled that the pleadings indicated that the alleged act occurred on July 31, 1972 and not, as Respondent contended, on May 31, 1972. Since the charge was filed on October 2, 1972, less than 120 days had elapsed.

Respondents three remaining grounds for dismissal all involved the Commission's failure to comply with time periods set forth in the statute. The Examiner determined that the ten day period within which notice of the charge must be served on the Respondent and the 180-day period within which the Commission must issue and serve the complaint are directory, rather than mandatory or jurisdictional, and that, in the absence of Respondent's showing of predjudice, the Commission cannot be divested of its jurisdiction.

II. EVIDENCE

After reviewing the record, we find that the Hearing Examiner's statement of the facts adduced at the hearing is comprehensive and without error. Accordingly, we adopt these findings of fact, set forth below, as not contrary to the manifest weight of the evidence.

A. Respondent

Respondent, SIRENA DIVISION OF CONSOLIDATED FOODS CORPORATION, is a manufacturer of women's swimwear. Its products are sold under the Sirena trade name to retail outlets by sales representatives who are assigned exclusive rights in various geographical territories. During the periods involved in this action, Complainant was the only female sales representative of the

Company. (TR. 307) However, three of the seven members of the Sirena Executive Board were women, and the Company also employed female sales personnel in its New York office. (TR. 307, 604, 605)

B. Complainant

Complainant, TRUDY UNGER, entered into a written contract with the Company in August, 1963. By the terms of this contract, Complainant agreed to act as sales representative for the Sirena line within a territory comprising Illinois, Indiana, Minnesota and Wisconsin. The Company agreed to pay Complainant a commission equal to 7% of the net sales within this territory. Complainant was responsible for all travel and selling expenses which she incurred. Further, Complainant was permitted to act as a sales representative for other non-competitive lines. (C. Ex. 2)

In the course of her business, Complainant maintained a bank account under the name "Trudy Unger & Associates" and filed an income tax return as a self-employed individual, operating the sole proprietorship of Trudy Unger Associates. (C. Ex. 47, 52) In 1965, Ohio was added to Complainant's territory. (TR. 49)

C. Sales Procedures

In order to sell the Company's products, Complainant would contact various retail outlets within her territory. In contacting these stores, Complainant operated relatively independently. She would set her own schedule, call on the customers she selected, and decide when and where to travel within the territory. She was directly responsible for all expenses which she incurred. (TR. 259, 260)

Complainant would make a report to the Company every week or two. These reports were made by telephone and,

until 1970, were directed to Arnold Seckler, the President of the Sirena Division. (TR. 62) In 1970, Maurice Newman was put in charge of all salesmen east of the Mississippi River, and Complainant, therefore, made her reports to him. (TR. 64, 261)

Further, various types of written communications would be sent between Complainant and the Company, including memoranda, periodic reports of commission earnings, and weekly reports of sales. (TR. 65-67) Complainant would also call the Company from time to time regarding such matters as shipping and deliver problems. (TR. 64, 65, 261)

Complainant received commissions on all sales that were made to stores within her territory. Sales could be made in any one of several ways. First, Complainant could write a sale while she was visiting a store within her territory. Second, customers who had been previously contacted by Complainant could call the New York or California showrooms and place their orders with Company personnel at these locations. (TR. 458, 893) Third, two or three times a year, the Company would pay for Complainant to go to New York and California. (TR. 65) While there, Complainant would see customers from her territory who had come to New York and California to place their orders. (TR. 459, 742, 743) Finally, Company personnel at New York and California showrooms would, on occasion, see Complainant's customers and take their orders for swimwear. (TR. 744, 965)

D. Complainant's Work Record

Between the years ending June 30, 1972, Complainant's annual net sales for Sirena increased over twenty-six times, from $20,620.00 to $572,016.00. (C. Ex. 64) During the same period, Company sales nation-wide increased nearly twelve times, from $383,241.00 to $4,528,826.00. (C. Ex. 65)

Company witnesses testified that during the last few years, there has been a shift in the Company's sales emphasis. The Company was now concentrating on making sales to large department stores, rather than small specialty shops. (TR. 525) There was testimony that Complainant had failed to adapt her sales techniques and procedures to adequately service the large department store account. (TR. 344-347) Newman testified that he talked to Complainant about the necessity for changing the way she wrote department store orders, (TR. 342), but that Complainant did not change her procedures. There was further testimony by Company witnesses that the Company was dissatisfied with Complainant's sales volume in her territory. It was asserted that the Company's competitors were doing better in the area. Finally, Complainant was allegedly criticized because the New York office was bearing too much of the burden of servicing Complainant's accounts. (TR. 470, 472, 540)

Criticisms directed against Complainant were not put in written form, and, in fact, the written memoranda up to 1972 often praised Complainant's performance. (TR. 280, 281, 344) (C. Ex. 13, 15, 16) Complainant denies that before May 23, 1972, she was criticized for these matters or that she was aware of any criticism about her sales performance. (TR. 70, 71, 976, 1056, 1057) Complainant states that the only Company projections of dollar sales volume applicable to her territory was contained in a note from Seckler in 1966 in which he stated that it was his belief that Complainant's "territory will yield $250,000.00 in a few years." (C. Ex. 15) Complainant's sales totals for the year ending June 30, 1969, was $339,498.00. (C. Ex. 64)

Finally, Complainant denies that she was criticized for over-using the New York office and denies that she did, in fact, use the facilities more than the other sales representatives. (TR 734, 893)

E. Company Reorganizes Sales Force

Starting in 1970, the Company undertook a reorganization of its sales force. During the next two and one-half years, six of the eight sales representatives, including Complainant, were terminated. The other five terminated sales representatives were men. During this period, eight new representatives were hired, as well as three new vice-presidents. In addition, two of the old territories were divided. (TR 473-489) (R. Ex. 2) The Company testified that the reorganization was motivated by the Company's desire to increase the volume of sales to large department stores. (TR. 485)

F. Termination of July 31, 1972

On May 23, 1972, Newman informed Complainant by phone that her services would no longer be required by the Company. (TR. 104) At this time, Newman also told Complainant that she was not performing her job adequately. (TR 104) Complainant testified that this was the first time that she had heard such criticism. (TR. 105) On June 5, 1972, Complainant received a letter dated May 30, 1972, which terminated Complainant's relationship with the Company as of July 31, 1972. (C. Ex. 6)

Following receipt of the termination letter, Complainant talked to Seckler and asked him to reconsider. (TR. 122) Late in June, Complainant talked to Newman and was told that a territory comprising Iowa, Kansas, Missouri, Nebraska and Illinois (excluding Chicago) was available. (TR 126, 550) Complainant expressed an interest in obtaining this territory. (TR. 129) The territory itself, as regards dollar volume, was much smaller than the one to which Complainant had previously been assigned. Complainant's old territory had a sales volume of over half a million dollars. (C. Ex. 64) In her discussions with Newman concerning the sales volume in the new territory, the

figure $250,000 was used. Newman stated this figure referred to the potential of the territory, while Complainant testified that the figure was represented to her as the current sales volume of this territory. (TR. 129, 361, 552) Complainant was also told that if she was assigned to this new territory, she would be covered by the Company's major medical plan and participate in the profit sharing program. (TR. 129, 130)

On June 30, 1972, Seckler wrote to Complainant and appointed her the sales representative for the 1973 season in the new territory. As in the past, Complainant was to receive full commission on all the sales made to customers in her territory. Further, she was again responsible for her selling expenses. The Complainant was still entitled to handle non-competing lines. The agreement was terminable upon thirty days written notice. (C. Ex. 22)

After receiving the appointment letter, Complainant called Seckler and asked why no mention was made of the major medical or profit sharing benefits. (TR. 132, 133) Seckler replied that it would be done. Newman subsequently told Complainant that in order for her to be entitled to these benefits, it would be necessary for her to be put on the payroll. (TR. 135, 136, 207)

After her termination on July 31, 1972, Complainant testified that she thought her original territory would be divided up among three salesmen. There had, in fact, been talk about dividing her territory in the past. (TR. 144, 525, 691-693) However, rather than divide the territory, most of Complainant's old territory was assigned to one salesman, John Anthony Herrman.

On August 21, 1972, the Company introduced its new line to the sales representatives at a meeting in California. (TR. 131, 1123) Company witnesses testified that following

the introduction of the new line, it was important for salesman to go out into the territory to get orders for the winter cruise seasons. In this regard, September sales were said to be important, since delivery of later orders could not be guaranteed by January, which is the peak of the cruise seasons. (TR. 573-584)

Complainant testified that in order to reduce her travel expenses, she had planned to contact the accounts in her territory closest to Chicago first. Later she would move to those that were farther away from Chicago. Further, Complainant states that she made plans to show her merchandise at the St. Louis and Chicago shows. Complainant states that Newman was aware of these arrangements and had not expressed any dissatisfaction. (TR. 158-162, 1123)

Newman, on the other hand, testified that during the month of September, he talked to Complainant several times about the necessity for getting out and traveling the territory, but that Complainant did not seem too interested in getting out and selling. (TR. 557, 570) Complainant did complain about her previous dismissal and the fact that her new territory was not as good as the old one. She told Newman that she needed other lines, and that she needed money to travel. (TR. 558) Respondent arranged to advance Complainant travel money of $350.00 per month. Further, Newman gave Complainant the names of three companies that she might call to obtain a second line, but Complainant made no serious effort to contact any of these companies. (TR. 556, 557)

On September 12th and 15th, Newman testified that he again talked to Complainant and urged her to start traveling. (TR. 571) Newman states that he pointed out to Complainant that she had not contacted some of the biggest stores in her territory. (TR. 572) Complainant responded

that she was only going to travel within a 50 to 75 mile radius of Chicago at first, and that she would not call on many of the stores until late October or November. (TR. 573) Newman told her that this would be too late to make delivery for the cruise season. (TR. 574, 575)

Newman testified that he talked to Mr. Earl Baird on September 13, 1972, about the possibility of becoming a sales representative for Complainant's territory. (TR. 585, 586, 667) (R. Ex. 13) Newman said that he had this conversation with Baird because he felt Complainant was not going to perform her duties. (TR. 586, 687)

In a later phone conversation between Newman and Complainant, Newman stated that he again told her that she would have to go out into the territory. Newman asserted that the Complainant was doing no better than her predecessor, who had been dismissed for poor performance. (TR. 363, 364) However, Complainant points out that as of October 13, 1972, her sales in the new territory were $21,062.00. The previous year, her predecessor had recorded sales during this period of $13,974.00 in a territory which was the same as Complainant's except that it did not include any part of Illinois. (C. Ex. 66) During this same period ending October 13, 1972, Herrman had recorded sales of $32,790.00 in a territory which was the same as Complainant's original territory, except that it excluded Illinois outside of Chicago. The previous year Complainant had recorded sales of $72,902.00 during this period. (C. Ex. 70) It is undisputed that at no time did Newman warn Complainant that she would be discharged if she did not go out into the territory. (TR. 362, 1123, 1124)

G. The October Termination

In September, 1972, Complainant testified that she became aware of information which indicated that the Re-

spondent had arranged for John Herrmann to replace her in her old territory much earlier than she had originally been told. (TR. 198) (C. Ex. 37) Thereafter, on October 2, 1972, Complainant filed a complaint in Case No. 72C-1136, alleging that the Company discriminated against her on the basis of sex when it took her old territory away from her and replaced her with Herrmann.

Also during this time, Complainant completed arrangements with another company, Belldoch-Popper, in which Complainant was appointed sales representative in a territory comprising Illinois, Wisconsin, northern Indiana and Michigan. (TR. 158, 234, 235) Under that Agreement, she was to receive a commission on all sales made in October and full territorial rights starting November 1, 1972. The Belldoch-Popper line was a non-competitive line. (TR. 288)

In the last week of September or the first week of October, Newman learned of Complainant's arrangement with Belldoch-Popper. He testified that he felt it confirmed his suspicion that Complainant was not interested in working the territory she had been assigned by Respondent. (TR. 591, 707) Newman testified that another sales representative had been terminated immediately when it become known that he had taken on a line in an adjacent territory. (TR. 596, 597)

Newman testified that by the first week in October, he had decided that Complainant would have to be replaced. (TR. 708, 709)

The Company received notification of the charge Complainant had filed in Case No. 72C-1136 on October 13, 1972. (TR. 592) On that same day, Newman called Complainant and asked her about the "suit" that she had filed. (TR. 593) Complainant told him that it was not a suit, but a complaint. (TR. 594) Newman testified that during

this conversation, he again stressed the necessity for having Complainant travel the territory, and stated that she wasn't fulfilling her obligations. Complainant testified that during the conversation, Newman stated that "anybody who is suing a company can't be working for the company at the same time," and suggested that Complainant resign. (TR. 165) Complainant then said that she could not talk further because a customer was in the office, and Newman told her that if she did not call back by 2:30 that afternoon, he would consider it her resignation. (TR. 167, 594)

Newman testified that he talked to Complainant a second time on the 13th, and that during that conversation, he again expressed displeasure with Complainant's performance, and particularly with the fact that she had taken an adjacent territory for the Belldoch-Popper Company. (TR. 595) Complainant states that she did not talk to Newman again that day, but reached him on Monday, the 16th, and informed him that she did not intend to resign. (TR. 167) Newman then informed Complainant that she was being terminated. (TR. 169, 598) Later that day, Complainant testified that she talked to Seckler. Complainant testified that during this conversation, Seckler questioned Complainant about the complaint she filed with the Commission. (TR. 173, 174) He advised her against taking this step and said that it would cost her money in lawyer's fees. Seckler tried to persuade Complainant to drop her complaint. Complainant stated that he also threatened legal action on the part of the Company against Complainant for her falure to live up to her responsibilities under the Sales Representation Agreement. (TR. 174)

Complainant stated that she told Seckler that the reason that she filed a complaint was because she had previously been told that she was going to be replaced by three sales representatives, and, in fact, only one man had replaced

her. (TR. 176) Seckler denied that there had been any unfairness to Complainant and stated that "we knew what your sex was for ten years." (TR. 176)

Later that day, Seckler wrote to Complainant and informed her that she had been terminated. The reason stated for the termination was her failure to make a trip to the Kansas, Nebraska, Missouri and Iowa territories with the 1973 line. Complainant was told to return her samples immediately to New York. (C. Ex. 27) Shortly thereafter, Complainant filed her second charge alleging retaliation as the cause of this second termination.

III. HEARING EXAMINER'S DECISION

A. Charge No. 72C-1136

In its post-hearing brief, Respondent had raised the issue of whether Complainant's initial charge was timely filed. Respondent argued that the charge should have been filed within 120 days after May 31, 1972, the date on which Complainant learned that she would be terminated. In his decision, the Examiner found that the applicable 120-day period did not begin to run until July 31, 1972, the effective date of the termination. (Although Respondent did not subsequently raise this issue, it should be noted that effective October 1, 1972, this limitation period in the statute was amended to provide that the charge must be filed within 180-days following the alleged discriminatory act. Thus, the 120-day period does not apply.)

A second issue raised by Respondent, concerning whether Complainant was an employer within the meaning of the definition in Section 2(c) of the Act, was not decided by the Hearing Examiner because he recommended that this charge be dismissed. The Hearing Examiner determined that Complainant had not sustained her burden of proving

by a preponderance of the evidence that she had been discriminated against because of her sex. The Examiner found that (1) Complainant was not treated any differently from the five male sales representatives who were terminated during Respondent's staff reorganization; (2) she was the only sales representative to be given a new territory after she was terminated; (3) she replaced a man in the new territory to which she was assigned; (4) the memoranda written by certain Respondent's employees, several of whom were women, contained references to her sex but do not support an inference of discrimination; and (5) the fact that Complainant was the only female sales representative does not indicate that she was terminated because of her sex.

B. Charge No. 72C-1197

Since the Hearing Examiner had found that the first charge was timely filed, he rejected Respondent's contention that the second charge must because the first charge was not filed within the statutory time period. The Hearing Examiner also ruled that the 180-day period within which the complaint must be issued and served following the filing of a charge is directory, and not mandatory or jurisdictional.

In addition, the Examiner determined that Complainant was an employee within the meaning of Section 2(c) of the Act, and not an independent agent because (1) after Complainant's relocation, she was put on Respondent's payroll and deductions were made from her paychecks; (2) she was promised coverage under Respondent's major medical and profit-sharing plans; and (3) Respondent alleged that she was terminated for her failure to obey company directives to travel in her new territory, indicating that Respondent considered her to be under its direction and control as an employee. The Hearing Examiner noted that a

finding that Complainant was an independent agent prior to the original termination would not affect the validity of the second charge because Section 3(d) of the Act proscribes retaliation against *any person* who in good faith has filed a charge with the Commission.

Regarding the merits of Charge No. 72C-1197, the Hearing Examiner concluded that Respondent had terminated Complainant on October 13, 1972 in retaliation for the charge of discrimination that she had filed. Respondent had contended that Complainant was discharged for valid business reasons. The Hearing Examiner reached his conclusion in light of his findings which were as follows:

(1) Complainant failed to travel in her new territory despite repeated requests by Respondent's officials that she visit her customers before it was too late to take orders for the "cruise" season;

(2) Complainant represented a non-competing line in a territory adjacent to the territory assigned to her by Respondent which Respondent claimed would impair ability to handle the territory it assigned her;

(3) When other sales representatives had taken on lines in adjacent territories they were immediately terminated;

(4) Respondent did not warn Complainant that her actions could result in her termination;

(5) Complainant was not terminated immediately after she took on the line in an adjacent territory, but was terminated two weeks later, after she filed her original charge of discrimination;

(6) On the day Respondent became aware of the charge, Newman suggested that Complainant resign and told her that if she did not return his call by a specific time, he would consider that she was terminated;

(7) Respondent's President, Seckler, advised Complainant to drop her charge and threatened to file suit against her as a result of which she would incur substantial legal expense;

(8) Immediately after these conversations Respondent sent a letter to Complainant terminating her relationship as a sales representative.

Accordingly, it was recommended that an order be entered as follows:

(1) That Respondent re-employ Complainant as a sales representative for the territory of Missouri, Iowa, Kansas, Nebraska, and Illinois (excluding Chicago);

(2) That Respondent pay to Complainant an amount of money equal to income lost from the date she was wrongly discharged, October 16, 1972, until she is restored to her former position. Such pay should be computed on the basis of Complainant's commission rate for the actual sales attributed to the territory, less any amounts that Complainant earned through the sale of competing lines or through other types of employment. The amount Complainant earned through her work with Belldoch-Popper should not be set off against the amount of back pay to which she may be entitled.

IV. CONTENTIONS OF THE PARTIES ON REVIEW

A. Complainant

Complainant filed a Petition for Review asking that the Commission reject the Hearing Examiner's finding that Complainant's original termination did not involve sex discrimination. Complainant cited numerous facts in the record that she claimed would support a finding of discrimination. Complainant also argued that prior to her original termination she was an employee within the meaning of the FEP Act because the Act defines an employee as a person who provides services for remuneration, and that her duties before and after she was put on the payroll were exactly the same.

B. Respondent

Respondent's Rejoinder urged that the Hearing Examiner's conclusions in regard to Complainant's charge of retaliation were unsupported by the evidence; Respondent contended that the record supported the conclusion that Complainant was terminated because she refused to travel in her new territory.

Respondent also argued that Complainant was an independent contractor at all times when she acted as a sales representative. In addition, Respondent renewed their contention that the untimely issuance and service of the complaint nullified the Commission's jurisdiction.

Finally, Respondent maintained that the Hearing Examiner's Recommended Order was incorrect. Respondent assigned error to the Hearing Examiner's failure to provide for a deduction of Complainant's operating expenses from her earnings and his failure to consider Complainant's earnings from the Belldoch-Popper line.

V. DECISION

Respondent had raised a variety of procedural and jurisdictional issues prior to the filing of its Rejoinder to Complainant's Petition for Review. However, in its Rejoinder Respondent has failed to renew some of these issues. We will address only those issues raised by Respondent in its Rejoinder and during oral arguments before the Commission.

A. Complainant's Status as an Employee

The Hearing Examiner declined to decide whether Complainant was an employee with respect to Charge No. 72C-1136 because he found that there was no discrimination involved. He did conclude that Complainant was an employee with respect to the retaliation charge No. 72C-1197. We

find that Complainant was an employee within the meaning of Section 2(c) of the Statute at all time relevant to the discriminatory acts alleged.

The question of whether a person is an employee or an independent contractor is generally answered by posing a second question: whether there is control by the "employer" over the manner and method of the work performed. Where there is such control, an employer-employee relation exists. *See Darner v. Colby,* 375 Ill. 558 (1941). Under this rule, Complainant should be considered an employee because Respondent has averred that she was terminated on July 31, 1972 as a result of her failure to respond to company directives concerning her sales methods.

The FEP Act defines "employee" very broadly, in Section 2(c), to include "any individual performing services for remuneration within this State for an employer . . ." This definition would appear to cover independent contractors well as "employees" in the strict sense of the work. And, in fact, the Act does not specifically require that a person be an employee to be entitled to its protection. Section 3 provides that "it is an unfair employment practice: (a) For an employer, because of the . . . sex . . . of an *individual* to refuse to hire, to segregate, or otherwise discriminate against such *individual* with respect to hire, . . . tenure, terms or conditions of employment. (emphasis added)."

Finally, it is clearly not necessary that a strict employer/employee relationship exist for a person to be entitled to protection under Section 3(d) of the Act which prohibits retaliation. Section 3(d) protects "any person" from retaliation, and does not require employee status.

B. Timeliness of the Complaint

Respondent takes the position that, because the Complaint was issued and served more than 180 days after

Charge No. 72C-1197 was filed the Commission is without jurisdiction to maintain proceedings based thereon. The Hearing Examiner properly ruled that the 180-day period is merely directory and therefore the Commission has not been divested of jurisdiction.

In administrative proceedings strict pleading and practice rules are not required. E.g., *Gigger* v. *Board of Fire and Police Commissioners*, 23 Ill. App. 2d 433; *Liquid Carbonic Co.* v. *Industrial Commission*, 352 Ill. 405. Further, strict compliance with statutory procedure rules is not always considered indispensable to the validity of acts done under them. *People ex rel Agnew v. Graham*, 267 Ill. 426, 437. This principle has been reaffirmed by Illinois courts in all situations, except those where non-observance of the statute has caused prejudice to a person whom the statute is designed to protect. *Carrigan v. Liquor Control Commission*, 19 Ill. 2d 230. And recent, the Illinois Appellate Court has specifically held that the Commission's failure to comply with the 180-day period in Section 8.01 of the FEP Act cannot deprive an aggrieved party of his rights under the statute:

> "If there is a jurisdictional statute of limitations in proceedings before the Commission, it should be the time period that runs between the act complained of and the date on which the charges are filed before the Commission by the person. To hold that an aggrieved party who timely files his charges with the Commission with regard to discrimination of employment will be barred from a remedy simply because the Commission fails to act timely with regard to his charges is tantamount to throwing the employed citizenry of this state to the wolves of bureaucratic indifference. The Commission was created to protect the fundamental and substantial employment rights of the citizenry with regard to non-discriminatory opportunity in employment. The Commission and the laws which created the laws of the Commission did not contemplate that the

Commission's administrative errors would (or could) prejudice such substantial statutory rights. Certainly there is nothing in the 1967 statute to suggest that the rights of aggrieved party, once he has filed his charge with the Commission, can be forfeited by the Commission's failure to take action. Appellants' counsel correctly states the general rule that where a statute proscribes a time within which a public officer is to perform official acts affecting the rights of others, the time proscribed is to be considered directory unless from the nature of the act the designation of time must be considered a limitation on the power of the officer. *Whalin* v. *City of Macomb*, (1875), 76 Ill. 49." *Moss-American Inc.* v. *Fair Employment Practices Commission*, Ill. App. 3d (1974).

C. Charge No. 72C-1136

Turning to the merits of this part of the case, we find that the Hearing Examiner's decision is not contrary to the manifest weight of the evidence. It was incumbent upon Complainant to show that her termination, replacement with a man, and subsequent re-instatement and re-assignment to a less profitable sales territory was because of her sex. We believe that the Hearing Examiner correctly found that the evidence failed to support these allegations.

It is significant that Complainant was just one of six of Respondent's sales representatives who were terminated as a result of a division-wide reorganization; all of the others were men. It is also significant that of all the persons terminated during the sales reorganization, only Complainant was rehired. We cannot conclude that Complainant was assigned to a different territory, which she claims had less profit potential, because of her sex in light of the fact that the boundaries of the sales territories were changed. This merely reflects the reorganization of the entire sales division. In fact, Complainant replaced a man in the new territory.

None of Respondent's actions towards Complainant with respect to her termination, re-instatement and re-assignment are shown by the evidence to have been discriminatory. Rather, it would appear that Complainant was given greater consideration than the male sales representatives who were terminated as a result of the division reorganization. It may be true, as Complainant argues, that her termination and re-assignment were not fully justified by her record with Respondent. The question to be determined under the Fair Employment Practices Act, however, is not simply whether the actions taken with respect to Complainant were severe or even drastic, but rather whether she was treated more harshly than male sales representatives similarly situated. The Hearing Examiner resolved this latter question in the negative, and we hold that his finding is not contrary to the manifest weight of the evidence.

D. Charge No. 72C-1197

Regarding the merits of Complainant's charge of retaliation, there is evidence to support Complainant's contentions. As the Hearing Examiner found, when Respondent became aware that Complainant had filed a charge of unfair employment practices (No. 72C-1136), Newman called Complainant, questioned her about the charge, and suggested that she resign. Later, when Complainant talked to Seckler, he too questioned her about the charge and advised her to drop the whole matter. He also threatened to sue Complainant. That same day, he wrote to Complainant stating that she was terminated. These facts, standing alone would indicate that her second termination constituted a reprisal for her previous charge, in violation of Section 3(d) of the Act.

However, Respondent contends that the totality of the evidence shows that Complainant's final termination was

based on other, valid business reasons. We must decide whether the evidence establishes legitimate, non-discriminatory reason for the termination.

The record indicates that during September, 1972, Complainant failed to arrange personal sales appointments in the new territory to which she had been assigned. At about this same time, Complainant had also entered into an agreement with another company to sell its product in another territory adjacent to the one to which she had been assigned by Sirena. According to Respondent, this was grounds for her immediate termination.

We conclude that these facts constitute legitimate, non-discriminatory reasons for Complainant's termination in October, 1972. We are not unmindful of the timing and events leading to the termination that the Hearing Examiner relied upon in finding a retaliatory discharge. However, these events must be viewed in the context of the other evidence showing that Respondent had valid reasons for terminating Complainant. As stated earlier, Complainant was not discriminated against when she was assigned to the new sales territory. As such, she was obliged to carry out her sales duties in the new territory according to the terms of her employment. The record establishes that she did not do so, even after repeated reminders.

The Hearing Examiner found that Respondent had valid reasons for terminating Complainant immediately after she took on the second line in another territory. He found it significant, however, that she was not in fact terminated until some two weeks later after Respondent learned that she had filed her initial charge. As we have said, this sequence of events in an ordinary case would certainly suggest retaliation. In this case, however, the evidence establishes that Respondent's officers were in regular con-

tact with Complainant during the time exhorting her to drop her other assignment and to begin to travel and contact accounts for Sirena. The record also indicates that these exhortations did not elicit a favorable response from Complainant, and that time was drawing short for cruise season sales. Under these circumstances, we conclude that Complainant was subject to imminent termination. To hold in this context that the termination became retaliatory when Respondent learned of Complainant's charge, would be tantamount to advising employers in future cases to discharge employees immediately when grounds become apparent before they are precluded by the filing of an intervening charge. Thus, in the context of this case we find that the Examiner's conclusion in No. 72C-1197 is contrary to the manifest weight of the evidence, and we reverse.

VI. ORDER

In view of the foregoing it is HEREBY ORDERED that the Complaint of TRUDY UNGER, against SIRENA DIVISION CONSOLIDATED FOODS CORPORATION, Charge Nos. 72C-1136, 72C-1197, be and hereby is DISMISSED.

Entered this 20th day of February, 1975.

FAIR EMPLOYMENT PRACTICES COMMISSION

BY:

Susan Bezucha, Acting Chairperson
Thomas G. McCracken, Commissioner
Wallace L. Heil, Commissioner
Alfred C. Whitley, Commissioner

APPENDIX E

IN THE

APPELLATE COURT, STATE OF ILLINOIS

FIRST DISTRICT

No. 76-1634.

TRUDY UNGER,

Plaintiff-Appellee,

v.

SIRENA DIVISION OF CONSOLIDATED FOODS CORPORATION and Illinois Fair Employment Practices Commission,

Defendants-Appellants.

McNAMARA, Justice:

This matter arises from two charges against defendant Sirena Division filed by plaintiff Trudy Unger with the Illinois Fair Employment Practices Commission. In the first charge plaintiff alleged that her termination by Sirena in May 1972 was due to sex discrimination. In the second charge plaintiff alleged that after she was rehired by Sirena and assigned to a new territory, she was discharged in October 1972 in retaliation for filing the initial charge with the commission. Hearings were held before a hearing examiner who submitted a recommended decision to the commission. The examiner recommended dismissal of the first charge, but found the second discharge was a retaliatory measure. After hearing arguments, the commission ordered dismissal of both charges. Plaintiff brought an action in the circuit court, and the court held that the commission's findings were against the manifest weight of the evidence. Sirena appeals. It contends that plaintiff was an independent contractor not covered by the Illinois Fair Employment Practices Act (Ill.Rev.Stat.1975, ch. 48, sec. 851 et seq.); that the trial court erred in reversing the commission's

finding that plaintiff's original discharge in May 1972 was not sexually discriminatory; and that the commission correctly found that plaintiff's second discharge in October 1972 was not a retaliatory measure.

The facts underlying this dispute are as follows. Sirena is engaged in the manufacture, distribution and sale of women's swimwear. Its merchandise is sold to retail stores by independent sales representatives who have exclusive rights to sell the Sirena line within various geographical territories. From August 1963 until May 1972, plaintiff was employed as Sirena's sales representative for the territory comprised of Michigan, Illinois, Indiana, Minnesota, Wisconsin and Ohio.

Plaintiff was hired by letter agreement in August 1963. Under this agreement plaintiff was an "independent agent" responsible for all travel and other selling expenses, taxes, and licenses. She was free to set her own schedule and to call upon customers she selected, and she was to pay for expenses she incurred. She was not required to account to Sirena for her daily activities. Plaintiff could carry non-competitive lines and the agreement acknowledged that she had such lines at that time.

Plaintiff's contact with Sirena was through orders placed and weekly telephone conversations regarding business operations such as shipping and delivery problems. According to plaintiff, she discontinued representing other lines in 1969 or 1970. At that time she approached Arnold Seckler, president of Sirena, and vice-president Maurice Newman to discuss the possibility of becoming an exclusive sales representative for Sirena. As such, her status would change to that of a salaried employee and she would be eligible for hospitalization and other benefits. Sirena never granted that request but, as of August 1969, paid plaintiff $100 each month to reimburse her for expenses incurred in maintain-

ing a Chicago showroom. Plaintiff continued to receive a seven percent commission of the gross sales on all business booked by Sirena or its agents in her territory. In addition, she received a 3.5 percent commission on the sale of close-out merchandise.

During the period she was engaged as a sales representative for that territory, plaintiff's dollar volume of sales increased from $22,000 to $572,000. Her percentage of the total company business increased from 6.3 percent in 1963 to 12.5 percent in her final year. Throughout this time, plaintiff was Sirena's only female sales representative.

From 1963 to 1972, Sirena's national sales grew from approximately $350,000 to over $4,700,000. In accordance with its growth, Sirena developed marketing strategies to meet its competitors and to increase its sales volume. At the commencement of the 1970-71 sales season, Seckler and Newman developed a plan to reorganize the sales force. During the course of the reorganization, Sirena hired a new vice-president to strengthen sales and terminated six of its eleven sales representatives. Plaintiff was among those terminated. According to Newman, the reorganization was designed solely to accomplish a shift in marketing emphasis away from small specialty shops to large department stores. His decision to terminate those six sales representatives was based upon their inability to handle their respective territories and to service the larger accounts.

Newman testified that starting in 1970 he attempted to correct plaintiff's method of writing department store orders, but she failed to improve. In January 1971, and on other occasions, Seckler and he met with plaintiff to try to correct her short-comings and to stress the importance of department store sales. In November 1971, he made a trip to Chicago to evaluate plaintiff and to urge the importance of placing a concerted effort on department store sales.

Plaintiff did not change the manner in which she worked with department stores.

In 1971 Seckler told plaintiff that her overall performance was unsatisfactory. Her territory accounted for more than 22 percent of the buying power in the country and sales of Sirena's competitors in her territory were far better. At that time, Newman told plaintiff that too great a burden of servicing midwest accounts was falling on the New York office. He testified his records showed that plaintiff utilized the New York office more than other representatives. According to Newman, such undue reliance was also a reason for the termination of two other sales representatives.

In a letter dated May 31, 1972, plaintiff was advised of her discharge effective July 31, 1972. The reason given was that ". . . due to the growth that has occurred in Sirena nationally and due to the necessity of fueling our continued plant expansion, it has become necessary to both strengthen and reorganize our sales staff."

In June 1972, plaintiff asked Seckler to reconsider the decision. Later that month plaintiff was offered the position as sales representative for the territory of Iowa, Missouri, Kansas, Nebraska, and Illinois (except Chicago). The former sales representative had been terminated because he was not doing an adequate job. After Seckler offered plaintiff the position, she called Newman and accepted. She told Newman that she wished to become a part of the organization again. On June 30, 1972, the parties entered into a written agreement whereby plaintiff was appointed sales representative for the new territory. Under the agreement, plaintiff was given exclusive rights in the territory, a seven percent commission, and the right to carry noncompetitive lines.

At the hearing, plaintiff introduced letters which Seckler had written in 1963, 1964, and 1966. Seckler wrote to advise plaintiff of the importance of her territory and the role which she was to play in bringing the territory into prominence. Seckler expressed his confidence in plaintiff's ability and told her he hoped that her territory's yield would improve. Plaintiff also introduced a letter from Seckler dated June 30, 1972, in which he told plaintiff that he was glad to have her "back on board."

According to Newman, the Sirena sales season commences September 1 when sample lines are sent to each sales representative. The first month of the sales season is critical because Sirena ordinarily books 30 to 35 percent of its annual sales at that time. In order for retail stores to have their merchandise in time for the winter cruise season, the orders must be obtained at the beginning of the season. Newman testified that early sales assist in obtaining subsequent sales throughout the year because most department stores plan their annual business during the cruise season. In addition, Sirena uses early sales to determine what styles will be profitable during the rest of the year.

On September 8, 1972, Newman telephoned plaintiff to advise her that all other sales representatives were on the road and to urge her to begin selling in her territory. On September 12 he again told plaintiff that it was imperative that she start traveling since she was the only sales representative who had not begun to travel. Newman told her concentrate on department store sales and he expressed concern about two stores. Plaintiff said that she would only travel within a 50-75 mile radius of Chicago at first and did not plan to call on stores in several states until late October and November. Newman replied that such a schedule would be too late to make delivery dates for the cruise season.

Newman thereafter telephoned plaintiff and advised her that she was not performing any better than her predecessor who had been discharged. Plaintiff stated that she was running the territory in the way she wished. Newman told her she was running it contrary to industry principles and that she had not yet called on the three stores which accounted for a large percentage of her projected volume.

Plaintiff testified that during the six weeks following her receipt of Sirena samples, she programmed her work so as to cover accounts within the 50-100 miles radius of Chicago. She did this to conserve on travel expenses and to arrange to carry a line with Beldock-Popper in her former territory. Plaintiff did not travel in her territory prior to her discharge in October. She testified that she planned to attend a show in St. Louis in October and one in Chicago in November. She planned to cover her territory later in the season because she did not believe cruise season orders to be too important. In plaintiff's opinion sales made to some of the department stores in her territory also were not too important.

Plaintiff introduced two memoranda sent to her by Janet Tolsky of Sirena's home office. They contained information concerning the commission balance owed plaintiff and a personal message encouraging plaintiff. Plaintiff also introduced into evidence a letter from Dolores Tessendorf, an executive secretary at Sirena. The letter, dated June 20, 1972, congratulated plaintiff on still being with Sirena, and added: "Maybe it's not *JUST* a man's world after all."

According to Sirena's records, plaintiff's sales in her new territory for the period ending October 13, 1972, amounted to $21,062. This figure exceeded the preceding year's sales by more than $7,000.

On October 2, 1972, plaintiff filed a complaint with the commission alleging that her discharge as sales representa-

tive for the first territory had been discriminatory. Newman testified that he learned of this on October 13, 1972 when his secretary told him the company had received some papers concerning a lawsuit. Newman discussed the complaint with plaintiff on the telephone and asked, since she was still with Sirena, why she had filed suit. Newman told plaintiff that he had been interviewing people to replace her as sales representative. He said he thought plaintiff should resign because things were not working out in her territory and he did not understand why she would want to sue and still work for Sirena.

On October 16, 1972, Seckler telephoned plaintiff to discuss the charge she had filed and told her he thought she was ill-advised to file the charge and that litigation would be costly. On the same day he wrote plaintiff terminating her appointment as a sales representative for Sirena. On October 26, 1976, plaintiff filed a second charge of unfair employment practice with the commission. In her complaint plaintiff alleged that her discharge on October 16 was a retaliatory discharge in violation of the statute. (Ill.Rev. Stat.1971, ch. 48, par. 853(d).)

We initially and succinctly address the issue of whether plaintiff was an employee entitled to coverage under the FEPA. The definition of employee in the FEPA is broad, and the exclusions set out are narrow ones. We agree with the holding of the commission that plaintiff was an employee of Sirena and, therefore, within the ambit of the FEPA.

Sirena next contends that the trial court erred when it reversed the commission's finding that plaintiff's first discharge in May 1972 was not the result of sexual discrimination. Under the FEPA, the commission must determine whether discrimination occurred based upon the preponderance of the evidence. (Ill.Rev.Stat.1971, ch. 48, par. 858(f).)

In reviewing the commission's action, the court must decide whether the agency's determination is against the manifest weight of the evidence. (*General Electric Co.* v. *Illinois Fair Employment Practices Co.* (1976), 38 Ill.App.3d 967, 349 N.E.2d 553.) Upon review of the dismissal of a charge by the commission, the proper scope of review is to ascertain from an adequate record whether the commission's order of dismissal is arbitrary, capricious, or an abuse of discretion. (See *Klein* v. *Illinois Fair Employment Practices Com.* (1975), 31 Ill.App.3d 473, 334 N.E.2d 370.) The commission fund it significant that plaintiff was one of six sales representatives terminated as a result of a division-wide reorganization. All of the other representatives were men. The commission noted that of all the persons discharged, only plaintiff was rehired. Because the boundaries of the sales territories were changed during the reorganization, the commission discounted plaintiff's assertion that she was assigned to a different territory with less profit potential because of her sex, and it observed that plaintiff replaced a male sales representative in the new territory.

Based on the foregoing evidence, the commission concluded that none of Sirena's actions towards plaintiff with regard to her May 1972 discharge were shown by the evidence to have been discriminatory. The commission rejected plaintiff's contention that her termination and reassignment were not fully justified by her record with Sirena. We agree with the commission that the question to be determined is whether she was treated differently than male sales representatives similarly situated. (See *McDonnell Douglas Corp.* v. *Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668; *A. P. Green Services Division of Bigelow-Liptak Corp* v. *Illinois Fair Employment Practices Com.* (1974), 19 Ill.App.3d 875, 312 N.E.2d 314). We hold that the commission's findings are amply supported by the rec-

ord and are not contrary to the manifest weight of the evidence.

We also must consider whether the commission's finding that plaintiff's second discharge in October 1972 was for legitimate reasons rather than in retaliation was proper. Plaintiff first argues that the commission lacked jurisdiction to consider this issue because her petition for review addressed only the question of her first discharge and Sirena did not seek review on the issue of whether a retaliatory discharge occurred. Under the FEPA, all matters raised in the record before the hearing examiner are properly before the commission. (Ill.Rev.Stat.1975, ch. 48, par. 858.02(c).) Therefore, the commission possessed jurisdiction to consider and rule on plaintiff's second charge.

Under FEPA, it is an unfair employment practice:

> "For any employer * * * to discriminate against any person because he or she, reasonably and in good faith, has opposed any practice forbidden in this Act, or because he or she, reasonably and in good faith, has made a charge, testified or assisted in any investigation, proceeding or hearing under this Act * * *." Ill.Rev.Stat.1975, ch. 48, par. 853(d).

The hearing examiner made the following findings with respect to the second charge filed by plaintiff. Plaintiff failed to travel in her new territory despite repeated requests by Newman and Seckler that she call upon customers before it was too late to fill orders for the cruise season. Plaintiff represented a noncompeting line in an adjacent territory and Sirena maintained that such would impair her ability to handle the territory assigned to her. Other sales representatives for Sirena had taken on lines in adjacent territories and were terminated immediately. Plaintiff, however, was not told that acceptance of the line would result in termination. Plaintiff was terminated two weeks after

she assumed the Belldock-Popper line and after she filed her original discrimination charge. On the day Sirena became aware defendant had filed a charge, Newman suggested she resign. Newman told plaintiff that if she did not return his call by a specific time, he would consider her discharged. Three days later Seckler called plaintiff, advised her to drop her charge, and threatened to file suit. Immediately after he talked to plaintiff, Seckler wrote terminating her appointment as sales representative.

Under FEPA, "[T]he commission shall review the record and may adopt, modify or reverse in whole or in part the findings and recommendations of the hearing examiner. The commission shall adopt the hearing examiner's findings of fact if they are not contrary to the manifest weight of the evidence." (Ill.Rev.Stat.1975, ch. 48, par. 858.02(d).) In its order the commission adopted the hearing examiner's findings of fact as set out above, but rejected his recommendation to sustain the retaliation charge. We agree with the commission's ruling.

The commission determined that for some time prior to plaintiff's second discharge by Sirena, Newman and Seckler had been in regular contact with her. During that time they exhorted her to concentrate on selling Sirena merchandise and to commence traveling in her new territory. The undisputed evidence is that plaintiff ignored these directives.

Plaintiff was obligated to carry out her sales duties in the new territory according to the terms of her employment. Since 1970 Newman and Seckler had attempted to correct plaintiff's sales methods. Plaintiff admitted that she did not change her approach and continued to service her territories in the manner she believed best. In September 1972, Newman complained to plaintiff about her inaction and warned her of the consequences if she did not put forth

a better effort. Plaintiff did not respond to those warnings, and conceded that she did not travel in her territory prior to her termination. She offered as an explanation only her belief that certain practices were not important. She also testified that during her second employment she was concerned with obtaining a noncompetitor's line in her old territory. Plaintiff's conduct toward Sirena was insolent and insubordinate. The record as reflected both by the examiner's findings and plaintiff's own testimony disclosed overwhelming support for Sirena's decision to terminate her employment and for the commission's determination that the termination was not retaliation.

Plaintiff has pointed out that she was Sirena's only female sales representative and that she was replaced by a single interviewee, a man. We do not perceive how that fact reveals any retaliation. Moreover, the record shows that her predecessor, a male, was discharged because of inadequate performance. Importantly, her replacement was interviewed weeks before plaintiff filed any charge of discrimination. It is undisputed that plaintiff's difficulties in employment long predated her second discharge. In considering a charge of this type, the timing of events is only one element which would show discrimination. As the commission noted in its order, to hold in the context of this case that the termination became retaliatory when Sirena learned of plaintiff's discriminatory charge would be tantamount to advising employers to discharge employees immediately when grounds become apparent before they are precluded by the filing of an intervening charge. If defendant proves valid reasons for the discharge, plaintiff must then demonstrate that the assigned reasons were a pretext or discriminatorily applied. (*McDonnell Douglas Corp.* v. *Green* (1973), 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668.) In the present case, plaintiff failed to so

demonstrate. The commission correctly reversed the recommendation of the hearing examiner as to the October discharge. We believe the trial court erred in reversing the commission's ruling.

For the reasons stated, the judgment of the circuit court of Cook County is reversed.

Judgment reversed.

JIGANTI, P. J. and SIMON, J., concur.

Opposition

Office - Supreme Court, U.S.
FILED
NOV 5 1981
ALEXANDER L. STEVAS

No. 81-656

In the
Supreme Court of the United States

OCTOBER TERM, 1981

CONSOLIDATED FOODS CORPORATION,
Petitioner,

vs.

TRUDY UNGER,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate and argumentative. The attention of the Court is directed to the Findings of Fact of the district court judge (Pet. App. B, pp. B-2 to B-18, Findings 1 through 44) and to the factual summaries in the opinion of the Seventh Circuit Court of Appeals (Pet. App. A).

For example:

1. Petitioner asserts that there was a:

> ". . . large scale reorganization of Sirena's sales territories and sales personnel. As part of this reorganization, Unger, along with five other male Sirena sales representatives, was terminated on the grounds that she had proven herself to be ineffective in selling to and dealing with department store customers." (Pet., p. 3)

This statement is directly in conflict with the Findings of Fact of the district court judge. (See Finding 22 on the "reorganization," and Findings 12, 13, 16, and 17 on the quality of Unger's work; Pet. App. B, at B-5 to B-8). The rejection of the purported reorganization and the finding that it was pretextual was clearly made by the Court of Appeals (Pet. App. A-12, A-13).

2. Petitioner also states that Unger was discharged from the second territory for the following reasons:

> "Due both to her failure to service her entire Sirena sales territory and her conflicting territorial obligations with the sweater manufacturer, Unger was terminated by Sirena on October 16, 1972." (Pet., p. 5)

Again, petitioner was merely making arguments from the evidence which had been rejected by both the district judge and the Court of Appeals (Pet. App. B-10, B-11; Findings 31, 32, 33, and 34). The Court of Appeals reviewed the same assertions and the evidence and concluded:

> "Finally, in addition to the evidence which casts grave doubt upon the legitimacy of Sirena's reasons, there is overwhelming evidence of a discriminatory motive. Upon first learning of plaintiff's FEPC complaint, Sirena Officials called and harrassed plaintiff, urging her to either drop her suit or resign. When plaintiff refused to do either, Sirena immediately terminated her for the alleged insufficiencies in her work. We simply cannot ignore the timing of Sirena's actions or the very transparent reasons given for the termination. Consequently, the district court properly concluded that Sirena had violated 42 U.S.C. §2000e-3(a)." (Pet. App. A-16)

3. Petitioner erroneously asserts that:

> "Unger's claims of discrimination received a full evidentiary hearing before the FEPC [Fair Employ-

> ment Practices Commission], which found in favor of Sirena on all claims." (Pet., p. 5)

The purpose of this assertion was to attempt to support plaintiff's claim that the proceedings before the state administrative agency were on a par with and superseded the authority of the district court to grant a trial de novo under Title VII. Petitioner's reference to a "full evidentiary hearing before the FEPC," implies that there was a hearing by the full commission. Actually the Commission itself heard no evidence but merely acted on the report of the hearing examiner. A more accurate statement can be found in the opinion of the Court of Appeals:

> "Plaintiff's state charges were heard before a Hearing Examiner appointed by the FEPC. He recommended to the FEPC a finding in favor of Sirena on the charge of sex discrimination and against Sirena on the charge of retaliatory discharge. The FEPC reviewed the record, reversed the finding of retaliatory discharge, and affirmed the finding of no sex discrimination." (Pet. App. A-3)

A comparison of the Findings of Fact of the district judge and the factual summaries in the opinion of the Court of Appeals with petitioner's Statement of the Case shows petitioner's singular inability to correctly state the facts or to recite any facts favorable to Unger or unfavorable to Sirena. Such a Statement of the Case should be rejected as of little assistance to the court. In considering the Petition for Certiorari, the court can best rely on the careful statement of facts of the district judge and the review and summary of those facts in the opinion of the Court of Appeals.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Petitioner seeks to enter this court on certiorari based on conflict among the federal Courts of Appeal. (Sup. Ct. R. 17, 1(a)) It references the fact that this court granted certiorari in *Kremer* v. *Chemical Construction Corp.*, No. 80-6045.

The reasons for granting *certiorari* in *Kremer* are distinct from any corresponding reason for granting *certiorari* in this case. *Kremer* was a case in the Second Circuit which stands outside the law as developed in other circuits and is based solely on *Sinicropi* v. *Nassau County*, 601 F.2d. 60 (2d Cir. 1979) *cert. denied*, 444 U.S. 983 (1979). In contrast, the decision of the Seventh Circuit is consistent with the statutory language and structure of Title VII and the decisions of this Court and the other circuits.

This distinction was carefully addressed by the Court of Appeals in this case, which followed not only its own decision in *Batiste* v. *Furnco Construction Corporation*, 503 F.2d 447, 450 (7th Cir. 1974) *cert. denied*, 420 U.S. 928 (1975) but the law developed in other circuits. As stated by the Court of Appeals:

> "With the exception of the Second Circuit's brief per curiam opinion in *Sinicropi* v. *Nasasu County*, 601 F.2d 60 (2nd Cir.), *cert. denied*, 444 U.S. 983 (1979), every court to address the question of the relationship between federal judicial proceedings under Title VII and related state proceedings concerning employment discrimination has used reasoning consistent with our *Batiste* analysis and has refused to give preclusive effect to the state proceedings.

See Smouse v. *General Electric Co.*, 626 F.2d 333, 336 (3rd Cir. 1980) (per curiam); *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1084-85 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9, 11-12 (6th Cir. 1972); *Kralowec* v. *Prince George's County*, 503 F. Supp. 985, 990-93 (D.Md. 1980)." (Pet. App. A-6 through A-8)

In addition to that statement, in a careful footnote, the court analyzed *Sinicropi* and added its voice to the voices of other courts which had criticized *Sinicropi's* erroneous reliance on *Mitchell* v. *National Broadcasting Company*, 553 F.2d 265 (2d Cir. 1977). As stated by the court:

"Sirena's reliance on *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2nd Cir.), *cert. denied*, 444 U.S. 983 (1979), is misplaced. In *Sinicropi*, the Second Circuit held in a brief per curiam opinion that a Title VII plaintiff, who previously had submitted her claim of sex discrimination to the New York State Division of Human Rights and had thereafter appealed the agency's adverse decision through the New York courts, was precluded by the principles of *res judicata* from relitigating in federal court her claim of sex discrimination. The court relied solely upon its holding in *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265 (2nd Cir. 1977), that the principles of *res judicata* apply to actions under 42 U.S.C. §1981. In *Sinicropi*, the court, without analysis, concluded that the reasoning for applying *res judicata* in §1981 actions was equally applicable to suits under Title VII.

"*Sinicropi* has been vigorously attacked and soundly rejected by other courts. *Smouse* v. *General Electric Co.*, 626 F.2d 333, 336 (3rd Cir. 1980); *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1083-84 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); *Kralowec* v. *Prince George's County*, 503 F.Supp. 985, 991-92 (D.Md. 1980). As these deci-

> sions clearly demonstrate, *Sinicropi* ignores the fundamental differences between actions under 42 U.S.C. §1981 and those under the unique statutory structure of Title VII. We join these courts in rejecting *Sinicropi's* attempt to interfere with Title VII's statutory scheme by applying principles of *res judicata* to prevent plaintiffs from securing a trial *de novo* in federal court." (Pet. App., A-6 and A-7, Footnote 5)

Petitioner further argues at pages 9 and 10 of its Petition that *Allen* v. *McCurry*, 101 S.Ct. 411 (1980) controls this case. Again, petitioner does not even consider the statement of the Court of Appeals from the footnote above noted. The Court of Appeals stated:

> "Similarly, defendant's reliance on the Supreme Court's recent pronouncement in *Allen* v. *McCurry*, ... U.S. ....., 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), regarding the application of *res judicata* and collateral estoppel to cases under 42 U.S.C. §1983 is misplaced. In concluding that *res judicata* and collateral estoppel could bar a plaintiff's federal suit under 42 U.S.C. §1983 on the basis of prior state proceedings, the Court stressed that the statutory and congressional history of §1983 does not evidence any intent to deny binding effect to valid state proceedings. 101 S.Ct. at 416-17. That history, however, is in direct contrast to the abundant statutory and legislative evidence that Title VII envisions a dual federal and state enforcement scheme culminating in an independent right to a trial *de novo* in federal court. *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-47 (1974)." (Pet. App. A-7, Footnote 5)

Perhaps most significant is the failure of petitioner even to consider the thrust of *Alexander* v. *Gardner-Denver Company*, 415 U.S. 36 (1974) despite the reference in the opinion of the Court of Appeals as to the

significance of that case in manifesting "a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." (Pet. App. A-6)

In *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36, 52-54 (1974), this court held that an employee's submission of a discrimination claim to final arbitration under a collective bargaining agreement did not preclude a Title VII action in the federal court based on the same facts. The court specifically addressed the issue of the application of the doctrines of *res judicata* and collateral estoppel to a Title VII action in broad terms: ". . . whatever doctrinal label is used, the essence of these holdings remains the same. The policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel." 415 U.S. at 49, n. 10. The Seventh Circuit Court of Appeals' recognition of Title VII plaintiff's right to *de novo* trial is based upon the statutory language and framework of Title VII and the decision of this Court.

In refusing to give preclusive effect to the limited state court judicial review of the administrative record, the Seventh Circuit in *Unger* focused on the importance of the fact-finding process in a *de novo* trial. As the Seventh Circuit pointed out:

> "The significant question in this case, and in the numerous conflicting state proceedings, is the inference of discriminatory intent to be drawn from those facts. This question was specifically a matter for the district court to consider in its trial *de novo*." (Pet. App. A-9)

In this case, a different determination was reached at each level of the state administrative and court pro-

ceedings. The Illinois state courts on administrative review had no power to conduct a *de novo* trial on the issue of discrimination — or any other issue. Ill.Rev. Stat., c. 110, §275. Only the hearing officer took evidence. Thereafter, neither commission nor court considered any of the evidence of the case directly. All inferences were drawn only from the bare record and the decision of the hearing officer, as in any administrative hearing, was without opportunity for discovery prior to the taking of testimony by the hearing officer. Under the circumstances, in an administrative hearing before a hearing officer, it is entirely possible for the respondent to make numerous unfounded assertions of purported reasons for a discharge. Those assertions failed when tested in a judicial hearing after full discovery. In *Texas Department of Community Affairs* v. *Burdine,* ..... U.S. ....., 49 U.S.L.W. 4214 (1981), this court recognized the importance of the liberal discovery rules of the federal courts in aiding the plaintiff in proving his or her case and showing pretext in a Title VII action.

In seeking state court administrative review, Unger attempted to resolve her claim at the state and local level. She attempted to use the more inexpensive, expeditious route to settle her claim. Furthermore, in appealing the administrative decision to the state court, she also enabled the state courts to review their own administrative agency.

As in the Petition for Certiorari, petitioner asserted before the Court of Appeals that there should be a difference in result because Unger sought review of the state administrative proceedings. The Court of Appeals treated that assertion directly:

> "We find Sirena's distinction to be without significance. Regardless of which party seeks state judicial review of administrative proceedings, foreclosure of Title VII's federal judicial remedy would serve to discourage plaintiffs from fully pursuing state proceedings and would conflict with Title VII's statutory scheme, which encourages resolution of discrimination claims by state authorities while reserving the right to proceed in fderal court. Our analysis is consistent with the Supreme Court's in *Gardner-Denver*, 415 U.S. at 49 n.10, that '[t]he policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel.'' (Pet. App. A-8)

In effect, the petitioner is asking this court to determine that, because a state administrative hearing was combined with limited state court administrative review of that record, such limited administrative review became the equivalent of a *de novo* trial in the federal court. In *Chandler* v. *Roudebush, supra,* 425 U.S. 840 (1976), this court rejected the notion that such limited administrative review by a federal court of a federal administrative agency record fulfilled plaintiff's statutory right to a trial in the district court under Title VII. The same reasoning is applicable against petitioner's assertion in this case.

Part II of the petitioner's reasons for granting certiorari is directed against the judgment of the Court of Appeals of the Seventh Circuit allowing attorney's fees for both the state proceedings and the federal proceedings. Petitioner fails to cite any of the grounds mentioned in Rule 17 of the Rules of the Supreme Court of the United States in support of its request for certiorari on the attorney's fee question.

In dealing with this question, petitioner merely asserts that "unfortunately, try as it might, Petitioner can find no support for this result in *New York Gaslight Club*. . . ." (Pet. p. 13) After making that statement, petitioner totally fails to consider the analysis of *New York Gaslight Club* in part V of the opinion of the Court of Appeals. (Pet. App. A-18 to A-20). That analysis will not be repeated here.

Finally, in the event that the Petition for Certiorari is allowed and the case proceeds to further briefing, respondent respectfully requests the court to further consider whether it would not have been more appropriate to base the calculation of Unger's back pay award on the actual earnings of her replacement in the Midwest territory for the seven years between the discharge and the trial rather than on a projection of her earnings based on her past history in the territory. This argument of respondent was rejected by the Court of Appeals in part IV of its opinion.

CONCLUSION

The Petition for Writ of Certiorari should be denied because it does not state sufficient reasons to warrant the granting of *certiorari*. The decision of the Seventh Circuit on the preclusion issue is consistent with the statutory language and framework of Title VII, this Court's decision in *Alexander*, and the decisions of the other circuit courts, with the exception of the Second Circuit. The variance in the Second Circuit decision is special in nature and based on an inadequately considered opinion in a single case. Alternatively, since the

preclusion issue raised by the petition is already before this court in *Kremer*, the court should hold this case pending the decision of *Kremer*.

The petitioner's second ground for certiorari questions the application of the rule of *New York Gaslight Club, Inc.* That ground presents none of the traditional reasons for the allowance of certiorari. Certiorari on that ground should be denied.

In the event that certiorari is allowed, respondent seeks leave to include the question of the measure of damages as being based on actual results rather than projected results.

Respectfully submitted,

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